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Sup. Ct.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1946

No. 141

THE CONFEDERATED BANDS OF UTE INDIANS, PETITIONERS,

vs.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED JUNE 3, 1946.

CERTIORARI GRANTED OCTOBER 14, 1946.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 1301

THE CONFEDERATED BANDS OF UTE INDIANS, PETITIONERS,

vs.

THE UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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—5046

[fol. 1]

IN THE COURT OF CLAIMS OF THE UNITED STATES

THE CONFEDERATED BANDS OF UTE INDIANS, Plaintiffs,

vs.

THE UNITED STATES OF AMERICA, Defendant

PETITION—Filed December 9, 1942

2. *Lands Vested in Plaintiff Pursuant to Treaty of 1868 and Executive Order of November 22, 1875, Taken From Plaintiff by Executive Order of August 4, 1882*

To the Honorable the Chief Justice and the Associate Judges of the Court of Claims:

Plaintiffs, the Confederated Bands of Ute Indians, respectfully represent:

1. Plaintiffs are a confederation of the Uncompahgre (sometimes designated as Tabeguache), White River [fol. 2] (sometimes designated as Yampa and Grand River), Southern and Ute Mountain Ute (which at the time of the agreement of March 6, 1880, hereinafter referred to, were jointly referred to as Southern Utes, and sometimes designated as Capote, Muache, and Weeminuche) Bands of Ute Indians, who were parties to an agreement of March 6, 1880, with the United States, ratified by Act of Congress of June 15, 1880, c. 223, 21 Stat. 199, 1 Kappler 180.

2. Plaintiffs file this petition under and pursuant to the Act of June 28, 1938, c. 776, 52 Stat. 1209, a copy of which is attached hereto and made a part hereof as Exhibit A, as amended by Act of July 15, 1941, c. —, — Stat. —, a copy of which is attached hereto and made a part hereof as Exhibit B.

3. Plaintiffs (except Southern Utes and Ute Mountain Utes), under agreements approved in accordance with existing law by the Secretary of the Interior on October 8, 1932, retained Raymond T. Bonnin to prosecute all claims of the Ute Indians; said agreements were, by approval of the Secretary of the Interior on February 13, 1935, assigned to Hughes, Schurman, and Dwight, who engaged

Ernest L. Wilkinson to assist them in the prosecution of the claims covered thereby; subsequently said agreements were, by approval of the Secretary of the Interior of March 31, 1938, assigned by Hughes, Schurman, and Dwight, in liquidation, to Ernest L. Wilkinson. Thereafter all the plaintiffs, under agreements approved in accordance with existing law by the Secretary of the Interior on January 17, 1939, directly retained Ernest L. Wilkinson to prosecute all claims of the Ute Indians.

4. No action has been taken by Congress or any other department of the Government with respect to the claim herein alleged, except in connection with the enactment [fol. 3] of the Act of June 28, 1938, and the amendatory Act of June 15, 1941, referred to in paragraph 1 hereof (Exhibits A and B attached hereto). Plaintiffs are and always have been the sole and absolute owners of the claim alleged in this petition; no person other than the plaintiffs has ever had any interest therein. No assignment or transfer of the claim alleged in this petition or any part thereof, or of any interest therein, has been made. Plaintiffs have not been paid for the claim herein made, or any part thereof, and are justly entitled to recover upon the claim herein made from the United States after allowing all just credits and offsets. Plaintiffs have at all times borne true allegiance to the Government of the United States, and have not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government.

5. By Treaty of March 2, 1868, 15 Stat. 619, 2 Kappler 990, a reservation was established for plaintiffs and the Uintah Utes in the Territory of Colorado, bounded by the 107th meridian on the east, the southern boundary of Colorado on the south, the western boundary of Colorado on the west, and a line fifteen miles north of the 40th parallel of north latitude on the north. It was agreed that the President might at any time order a survey of the reservation.

6. The northern line of the aforesaid reservation was not surveyed until about seven years after the date of the Treaty of 1868. At about the time the survey of the north line of the reservation was completed, certain lands lying between the north boundary of the reservation de-

scribed by the Treaty of 1868 and the first standard parallel north were by means of Executive order of November 22, 1875, 1 Kappler 834, set apart by the President of the United States for the use of the several tribes of [fol. 4] Ute Indians as a part of the reservation described in paragraph 5 hereof.

7. By agreement between plaintiffs and defendant of March 6, 1880, which was amended, ratified and confirmed by Act of Congress of June 15, 1880, c. 223, 21 Stat. 199, 1 Kappler 180 (amended by Act of July 28, 1882, c. 357, 22 Stat. 178, 1 Kappler 205), plaintiffs undertook to cede to the United States all their then reservation in Colorado (which included the territory added to the 1868 reservation by the Executive Order referred to in paragraph 7 hereof), except certain lands to be retained for their use. Defendant undertook to sell all lands not retained for the use of plaintiff, and, after certain stipulated payments, deposit the proceeds in the Treasury of defendant for the benefit of plaintiffs. The aforesaid agreement was ratified and approved by three-fourths of the adult male Indians of the Confederated Bands of Utes within the time limit fixed by Section 10 of said Act of June 15, 1880.

8. Notwithstanding the duty of defendant, under the agreement of 1880 referred to in paragraph 7 hereof, to hold for sale for plaintiffs' use, benefit and account the lands added to plaintiffs' reservation by the Executive order of 1875, cited in paragraph 6 hereof, the President of the United States, by Executive order of August 4, 1882, 1 Kappler 834, ordered the said lands restored to the public domain. Plaintiffs believe and therefore aver that defendant has failed ever to account to plaintiffs for the proceeds of said lands; has never paid into the Treasury of the United States the proceeds of sale of said lands as provided in the said agreement of 1880 or under the Act of July 28, 1882, c. 357, 22 Stat. 178, 1 Kappler 205; but, on the contrary, under the aforesaid Executive order of 1882, has taken and appropriated said lands to [fol. 5] its own use and benefit free from the trust restrictions imposed by said agreement.

9. Plaintiffs make no claim herein for other appropriations of lands or funds of plaintiffs or any of them, than

as to lands added to plaintiffs' reservation under the Executive order of November 22, 1875, hereinabove described. Plaintiffs reserve the right, as separate bands and jointly, to file a suit or suits as respects any other claims which they, or any of them, have against the United States. Plaintiffs, by this petition, ask only for damages for lands forming a part of their reservation under Executive order of November 22, 1875, and taken by defendant under the Executive order of August 4, 1882, as set forth in paragraph 8 hereof, and do not include within this petition claim for any other lands taken by the Executive order of August 4, 1882; and this claim is pleaded separately as authorized by section 2 of said Act.

10. By virtue of the aforesaid taking and appropriation by defendant of the aforesaid lands, plaintiffs have a right of action against defendant for (a) the minimum price at which defendant, under the aforesaid agreement of March 6, 1880, agreed to sell and dispose of such land, or (b) the value of such land, whichever is the greater.

11. Wherefore plaintiffs pray that defendant make a full and true discovery and disclosure of the acreage forming a part of their reservation under the Executive order of November 22, 1875, and taken and appropriated to its own use under the aforesaid Executive order of August 4, 1882, and render a complete and accurate account thereof and of all relevant facts connected therewith; and that defendant be adjudged liable to plaintiffs for such taking and appropriation, in such amount as upon a complete and accurate accounting this Court may find due and owing [fol. 6] to the plaintiffs as reasonable and just compensation, but in no event less than the minimum price at which defendant had agreed to sell such lands.

Ernest L. Wilkinson, Attorney for Plaintiff, 1109 Earle Building, Washington, D. C.

DISTRICT OF COLUMBIA, SS:

Ernest L. Wilkinson, being duly sworn, deposes and says:

That this suit is filed pursuant to the authority conferred on Ernest L. Wilkinson by agreements with plaintiffs detailed in paragraph 3 of the foregoing petition; that certified copies of said agreements have been lodged with the Clerk of this Court; that he makes this verification for and

on behalf of plaintiffs pursuant to Section 2 of the Act of June 28, 1938, under which this suit is prosecuted; that he has read the foregoing petition and that the statements made therein are true to the best of his knowledge, information and belief.

Ernest L. Wilkinson.

Subscribed and sworn to before me this 9th day of December, 1942. Anna A. Hammond, Notary Public, District of Columbia. My commission expires June 1, 1943. (Seal.)

[fol. 7] EXHIBIT "A" TO PETITION

Jurisdictional Act of June 28, 1938, c. 776, 52 Stat. 1209

An Act

Conferring jurisdiction upon the United States Court of Claims to hear, examine, adjudicate, and render judgment on any and all claims which the Ute Indians or any Tribe or Band thereof may have against the United States, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That jurisdiction is hereby conferred on the United States Court of Claims to hear, determine, and render final judgment on all legal and equitable claims of whatsoever nature which the Ute Indians or any tribe or band or any constitutent[1] band thereof, may have against the United States, including, but without limiting the generality of the foregoing, claims arising under or growing out of any treaty or agreement of the United States, law of Congress, Executive order, or by reason of any lands taken from them, without compensation, or for the failure or refusal of the United States to protect the interest of any of said bands in lands (as to which any of said bands had the possessory right of use and occupancy), or because of any mismanagement or wrongful handling of any of the funds, land, property, or business enterprises belonging to or held in trust for any of said bands by the United

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[1] So in original.

States, or any misfeasance or nonfeasance on the part of the United States with respect thereto, or otherwise.

Sec. 2. Suit or suits under this Act may be instituted by any of the aforesaid bands of Indians (each band to have the right to sue for constituent bands comprising said band), either separately or jointly, as party or parties plaintiff against the United States as party defendant, by filing within five years of the enactment of this Act its or their petition or petitions in the Court of Claims and [fol. 8] serving with respect to each suit, a copy thereof on the Attorney General of the United States who, either in person or by some attorney from the Department of Justice to be designated by him, shall appear and defend the interest of the United States. Such petition or petitions shall set forth the facts on which the claim or claims for recovery is or are based and shall be verified by the attorney or attorneys employed by said band or bands of Ute Indians, under contracts approved in accordance with existing law, to prosecute said claims, which may be made upon information and belief, and no other verification shall be necessary. The petition or petitions shall be subject to amendment at any time prior to final submission of the case to the Court of Claims. Such petition or petitions may, in addition to alleging specific claims, demand a general accounting of all funds and property expended or used by the United States for it or their account, in which event the General Accounting Office or its successor shall within a reasonable time from the time of filing said petition make a complete audit of said accounts and, in addition to the usual copies for the Attorney General, shall deliver a copy thereof to the Secretary of the Interior, and the court, after a full hearing, shall state the account, and render judgment in accordance therewith.

Sec. 3. At the trial of any suit instituted hereunder the court shall apply as respects the United States the same principles of law as would be applied to an ordinary fiduciary and shall settle and determine the rights therein, both legal and equitable, of said bands of Ute Indians against the United States, notwithstanding lapse of time or statutes of limitation. In the determination of the validity of any claim asserted or defense interposed hereunder, the Court shall have the full power and authority of a court of equity.

Sec. 4. The court shall have authority, by proper orders and process, to make parties to any suit or suits instituted hereunder any other tribe, band, or group of Indians deemed by it necessary or proper to a final determination of the matters in controversy.

[fol. 9] Sec. 5. No payment or payments which have been made by the United States upon or in satisfaction of any claim or claims asserted in any suit brought hereunder or expended for any of the aforesaid bands of Ute Indians or members thereof shall apply as an estoppel against any suit brought hereunder, but there shall be set off against any recovery obtained by any band of said Indians hereunder, any payment made by the United States on any claim asserted by said band and such gratuity expenditures made by the United States for the benefit of said band as are directed to be set off by the Second Deficiency Appropriation Act, fiscal year 1935 (Public, Numbered 270,[1] Seventy-fourth Congress).

Sec. 6. If the court shall find that any lands formerly belonging to the said bands of Ute Indians or any of them, have been taken by the United States without compensation therefor and set apart and reserved as national reservations or for other public uses or otherwise classified, reserved, or withdrawn from entry and sale under the public land laws or disposed of in any manner whereby the said Indians have been deprived of the use or benefits of such lands and the natural resources thereof, it is hereby declared that such action shall be sufficient grounds for equitable relief and the court shall render judgment in favor of said Indians, and shall award to them, as for a taking under the power of eminent domain, compensation for all such lands and natural resources, anything in any other Acts of Congress to the contrary notwithstanding, no lands in Colorado north of and including range 35 formerly owned or claimed by the Ute Indians or any band thereof shall be restored to tribal ownership under the provisions of section 3 of the Act of June 18, 1934 (48 Stat. 984), and said lands to the extent that they have not been disposed of by the United States are hereby declared to be the absolute property of the United States: *Provided*, That there is hereby added to the exist-

[1] So in original.

ing Southern Ute Indian Reservation in tribal ownership of the vacant, undisposed of ceded lands within the following described boundaries:

[fol. 10] Beginning at a point on the western boundary line of the State of Colorado, being the northwest corner of the existing Southern Ute Indian Reservation; thence north to the township line separating townships 34 and 35 north, range 20 west; thence east along said township line to the southwest corner of section 35, township 35 north, range 19 west; thence north to the northwest corner of section 2, township 35 north, range 19 west; thence east to the northeast corner of section 1, township 35 north, range 18 west; thence north to the northwest corner of section 31, township 36 north, range 17 west; thence east to the northeast corner of section 35, township 36 north, range 17 west; thence south to the north boundary of the existing Southern Ute Indian Reservation; thence west along the north boundary of the said reservation to the west line of section 9, township 34 north, range 17 west; thence north to the northwest corner of section 21, township 35 north, range 17 west; thence west to the southwest corner of section 17, township 35 north, range 17 west; thence south to the southeast corner of the northeast quarter of the northeast quarter of section 19, township 35 north, range 17 west; thence west to the southwest corner of the northeast quarter of the northwest quarter of said section 19; thence north to the north line of said section 19; thence west to the southwest corner of section 17, township 35 north, range 18 west; thence south to the north boundary of the Southern Ute Indian Reservation in section 7, township 34 north, range 18, all west of the New Mexico principal meridian; thence west along the said north boundary to the point of beginning: *Provided further*, That any orders restoring or attempting to restore to tribal ownership any portion of the lands in Colorado north of range 35 are hereby rescinded and annulled.

Sec. 7. In any suit instituted hereunder, any letter, paper, document, map, or record in the possession of any officer or department of the United States (or certified copy thereof) may be used in evidence, and the departments of the Government of the United States shall give full and free access to the attorneys for any of said bands of Indians to such letters, papers, documents, or records as may be useful to said attorney or attorneys in the preparation

[fol. 11] for trial or trials of such suits and shall afford facilities for the examination of the same.

Sec. 8. Upon the final determination of any suit, cause, or action instituted hereunder, whether by judgment, compromise, or otherwise, the Court of Claims, in the event of success by any plaintiff, or in the event any claim asserted by any of said bands of Indians shall be compromised or settled without the institution of any suit hereunder, the Secretary of the Interior, shall decree that there shall be paid to the attorney or attorneys employed therein by said plaintiff under contracts negotiated or entered into as provided by existing law, such fees as, based upon a quantum meruit, it or he shall find reasonable, and in addition such actual and necessary expenses incurred by the attorney or attorneys in preparation and prosecution of said claims. In no case shall the fees decreed by said Court of Claims and/or by the Secretary of the Interior be in excess of the amount stipulated in the contracts approved by the Commissioner of Indian Affairs and the Secretary of the Interior, and in no event to exceed 10 per centum of the amount of the recovery, and shall be paid upon money being appropriated for the benefit of any bands of Ute Indians pursuant to any judgment or settlement hereunder whether distributable thereto or not.

Sec. 9. The net amount of any judgment recovered shall be placed in the Treasury of the United States to the credit of said Indians and shall draw interest at the rate of 4 per centum per annum from date of judgment or settlement and shall, thereafter, be subject to appropriation by Congress for the benefit of said Indians, including the purchase of lands and building homes, and no part of said judgment, without further legislation, shall be paid out in per-capita payments to said Indians.

Approved, June 28, 1938.

[fol. 12] EXHIBIT "B" TO PETITION

Act of July 15, 1941, Amending Jurisdictional Act, — Stat. —

An Act

To amend the Act entitled "An Act conferring jurisdiction upon the United States Court of Claims to hear, examine, adjudicate, and render judgment on any and all claims which the Ute Indians or any tribe or band thereof may have against the United States, and for other purposes", approved June 28, 1938

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 6 of the Act entitled "An Act conferring jurisdiction upon the United States Court of Claims to hear, examine, adjudicate, and render judgment on any and all claims which the Ute Indians or any tribe or band thereof may have against the United States, and for other purposes", approved June 28, 1938, is hereby amended by striking out the words "anything in any other Acts of Congress to the contrary notwithstanding" and inserting in lieu thereof a period and the following: "Anything in any other Acts of Congress to the contrary notwithstanding"; by striking out "range 35" wherever it appears in such section and inserting in lieu thereof the following: "township 35 north"; by striking out the word "of" following the word "ownership" appearing in the first proviso of the said section; and by striking out the word "constitutent" in section 1 and inserting in lieu the word "constituent".

Approved, July 15, 1941.

[fols. 13-14] GENERAL TRAVERSE—Filed December 16, 1942

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the pettion be dismissed.

Norman M. Littell, Assistant Attorney General.

ARGUMENT AND SUBMISSION OF CASE

On February 5, 1946, the case was argued and submitted on merits by Mr. Ernest L. Wilkinson for plaintiffs and by Mr. Wilfred Hearn for defendant.

[fol. 15] **Special Findings of Fact, Conclusion of Law and Opinion of the Court by Whitaker, J.; Concurring opinion by Littleton, J.**—Filed March 4, 1946

Mr. Ernest L. Wilkinson for the plaintiff. Messrs. John W. Cragun and Francis M. Goodwin were on the brief.

Mr. Wilfred Hearn, with whom was Acting Assistant Attorney General J. Edward Williams, for the defendant. Messrs. George T. Stormont and Marvin J. Sonosky were on the brief.

The facts necessary to a decision of the case are set out in the opinion; they are set out more in detail in the following special findings of fact.

SPECIAL FINDINGS OF FACT

1. The petition in this case was filed pursuant to the jurisdictional act of June 28, 1938 (52 Stat. 1209), as amended by the act of July 15, 1941 (55 Stat. 593), which provided *inter alia* as follows:

> If the court shall find that any lands formerly belonging to the said bands of Ute Indians or any of them, have been taken by the United States without compensation therefor and * * * or disposed of in any manner whereby the said Indians have been deprived of the use or benefits of such lands and the natural resources thereof, it is hereby declared that such action shall be sufficient grounds for equitable relief and the court shall render judgment in favor [fol. 16] of said Indians, and shall award to them, as for a taking under the power of eminent domain, compensation for all such lands and natural resources, * * *

2. Plaintiffs are a confederation of the Uncompahgre (sometimes designated as Tabequache), White River (sometimes designated as Yampa and Grand River), Southern and Ute Mountain Ute (which at the time of the agreement

of March 6, 1880, hereinafter referred to, were jointly referred to as Southern Utes, and sometimes designated as Capote, Muache, and Weeminuche) Bands of Ute Indians.

3. Plaintiffs were parties to a treaty of March 2, 1868, with the United States (15 Stat. 619, 2 Kappler 990) whereby a reservation was established for them in what is now the State of Colorado, Article II of the treaty being as follows:

> The United States agree that the following district of country, to wit: commencing at that point on the southern boundary line of the Territory of Colorado where the meridian of longitude 107° west from Greenwich crosses the same; running thence north with said meridian to a point fifteen miles due north of where said meridian intersects the fortieth parallel of north latitude; thence due west to the western boundary line of said Territory; thence south with said western boundary line of said Territory to the southern boundary line of said Territory; thence east with said southern boundary line to the place of beginning, shall be, and the same is hereby, set apart for the absolute and undisturbed use and occupation of the Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit among them; and the United States now solemnly agree that no persons, except those herein authorized so to do, and except such officers, agents, and employes of the Government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law shall ever be permitted to pass over, settle upon, or reside in the Territory described in this article, except as herein otherwise provided.

By Article III of the Treaty, the Indians, parties thereto, relinquished "all claims and rights in and to any portion [fol. 17] of the United States or Territories, except such as are embraced in the limits defined in the preceding article."

4. By agreement of September 13, 1873, ratified by the Act of April 29, 1874 (c. 136, 18 Stat. 36), the Ute Indians ceded to the United States over three million acres of the reservation established by the treaty of March 2, 1868.

5. Article IV of the treaty of March 2, 1868, provided, in part, as follows:

> The United States agree to establish two agencies on the reservation provided for in article two, one for the Grand River, Yampa, and Uintah bands, on White River, and the other for the Tabequache Muache, Weeminuche, and Capote bands, on the Rio de los Pinos, on the reservation, * * *.

The agencies provided for in the treaty were established by the defendant during the latter part of 1869. The one for the Grand River, Yampa, and Uintah bands (northern agency) was established on White River in latitude 40°6′ north, and longitude 107°40′ west. It was thought to be south of the north boundary line of the reservation. With reference to the location of this White River Agency the United States Indian Agent, in his report of September 15, 1869, said:

> * * * White River at this point contains a great abundance of water for mill and irrigating purposes, it being about the size of Platte River at this place. There is plenty of good cottonwood timber along the stream, and pine in the mountains some six miles distant. The side valley and adjacent hills afford abundant pasturage for the stock of the agency and the Indians.
>
> Some years ago I explored White River from its mouth to its headwaters, and this is the best valley along its entire course. It is a warm valley, and stock will subsist the year round upon the pasturage. A better place could not be found in the northern part of the reservation, in my opinion. * * *

The other agency was established far to the south.

6. At or soon after the establishment of the White River (northern) Agency, some miners began working along Douglass Creek in Wyoming, considerably north of the White River Agency, and the Indians objected. In his report of [fol. 18] December 23, 1869, the Commissioner of Indian Affairs mentioned the incident as follows:

> * * * no difficulty having arisen during the past year, except with some miners on Douglass Creek,

whom they ordered off as trespassers upon their reservation, but who in fact were not, the land being fifty miles distant from the reserve; the matter being explained to the Indians, no further trouble is apprehended. * * *

Of the incident the Superintendent of Indian Affairs in his report of September 1, 1869, said:

> * * * Of the condition of affairs at the northern or White River agency, I have to report that on August 31, 1869, I received a letter from Hon. J. A. Campbell, governor of Wyoming Territory, stating that on the 25th day of August 1869, a deputation of the Utes visited the miners of Douglass Creek, Wyoming, and in North Park, Colorado, and notified them that two days would be given them in which to quit the "diggins," as by working these mines they were trespassing upon the lands set aside for the exclusive use of the Grand River and Uintah bands of Utes, by the treaty of 1868. In this assertion the Indians were mistaken, as the mines of Douglass Creek, Wyoming, and in North Park, Colorado, are not within fifty miles of the reservation.
>
> Immediately upon the receipt of Governor Campbell's letter, I dispatched Lieutenant Parry, with full instructions in the premises, a copy of which has been sent to your department; and when the Indians fully understand the matter, I believe there will be no further difficulty. * * *

In his report of September 10, 1874, the United States Indian Agent stated, with respect to the location of a proposed wagon road down the Bear River Valley, north of the White River Agency, as follows:

> * * * Soon after my arrival here, in July, the Indians requested to have a "talk" with me about a proposed wagon-road which is to pass down the Bear River Valley, which valley they claim as their country. I listened to their remonstrance against the opening of such a road, and at their request wrote to the Commissioner of Indian Affairs in regard to the matter. Upon my return to the agency in August, I read to them "in [fol. 19] council" the reply of the Commisisoner, which

was, in substance, that the Bear River country was not theirs and that they had no rights in it whatever. The Indians listened to me respectfully, and dispersed quietly, and I have heard nothing from them in regard to the matter since. It is much to be desired that the northern boundary of the reservation be accurately defined and made plain to the Indians by natural landmarks. I have heard some reports of their threatening to drive off persons who have and are making efforts to settle the Bear River Valley, but have not learned that they have resorted to any open violence.

In his report of June 21, 1875, the Indian Agent, E. H. Danforth, said:

At the persistent solicitation of all the principal Indians of this Agency, and to satisfy them, I write to request, in their name, that a few of their leading Chiefs, accompanied by their Agent, may be allowed to visit Washington this fall to consult with the authorities there in regard to subject of the northern boundary of this Reservation. I have endeavored to make them realize the expense attending such a journey and the improbability of their request being granted, but nothing would do, but I must write.

In regard to this matter, however, I would say, should the Commissioner deem it advisable, should there be money which might reasonably be expended for such a purpose, I think that such a visit and conference would be the means of correcting the misunderstanding which now appears to exist among the Indians here in regard to the conditions of the Treaty of 1868 determining the boundaries, northern and eastern of their Reservation, and would induce them to be more quiet and contented in the face of the present and proposed immigration of white settlers to the Bear River Valley.

I would state that I have done all in my power to make the Indians acknowledge that the country referred to does not belong to them. If I have talked a minute I have talked a hundred hours on the subject and so far as I can learn in the numerous councils which I have had with them most, if not all, the Indians here acknowledge and are living under the Treaty of 1864, and do not recognize the conditions of any other which

would [limit (?)] the extent of their territory—at least I can get no concession from them to that effect. I would say, however, that if the Indians here are really convinced that the white settlers on the Bear River [fol. 20] are trespassers on their lands they act with uncommon and commendable forebearance in the matter, doing no violence, and simply protesting that the whites do not do right to come there—with one exception to which I referred in my monthly report for May last. Of this Bear River matter and the complaint of Miss Smart, copies of which I have just received I address you in a special communication.

7. In October or November 1875, a survey (the first one ever made) of the north boundary of the reservation was completed by J. W. Miller, and from it it was ascertained that the north boundary of the reservation was south of White River nearly the entire length of the line, and that the buildings of the White River Agency were north of the line. This established the north boundary of the reservation at a location south of where the defendant's agents had thought, and far south of where the Indians had thought, the line ran.

In his report of October 21, 1875, Indian Agent, E. H. Danforth, said:

> In regard to making any authoritative statement to the Indians of my agency as to the exact location of the northern boundary of the Ute Reservation in Colorado I find myself in a very embarrassing situation. Upon receiving information that the contract for surveying said boundary had been awarded to Mr. J. W. Miller, and learning that the work could be prosecuted this season, I was in hopes that the matter would be quickly and finally settled, and that my duties in regard to informing the Indians of the extent and limits of their territory would be made plain to me.
>
> Mr. Miller has been at my agency; he has given me what information he could; he has talked with some of the leading Indians; and proceeds in the work of running a certain line which he had commenced to run before I saw him but still I know little more in regard to the main question than I knew last fall.

Mr. Miller came to the agency the 10th of October, and conferred with me and two of the leading Chiefs of the tribe; he stated that he was simply instructed to find a certain corner east of here which was supposed to be the northeast corner of the Ute Reservation in Col., and to run thence a line due west to the western boundary of the territory. Upon arriving at said N. E. corner he found it to be, as he thought, from fifteen to eighteen miles south of the position in which it was [fol. 21] supposed to be as established by the treaty of 1868. He informed me that he repeatedly so declared it to be to his assistants and members of his party before meeting me. Acting under instructions he had nothing to do but to run a line due west from said corner. Upon proceeding with the survey of said line it passed about one eighth (⅛) of a mile south of the agency buildings, cutting them all off. All the tillable land of this valley, all of the cattle range; in fact I may say all of the White River Valley;—all of the valley which the Utes have occupied as a home for years, which I and the agents preceding me have informed them was still theirs and would not be taken from them. I requested Mr. Miller to tell me in the presence of the Chiefs referred to whether he was running the northern boundary line of the Ute Reservation, and if not to state approximately where such boundary line would run. He informed me and the Indians that he was not running the boundary line and that their line would be found to run from 15 to 18 miles north of the agency building.

What Mr. Miller said agreed exactly with all that I had previously been able to learn from maps and other sources in the matter, and with what I had previously told the Indians when obliged to say something in reply to their persistent questioning.

A division of the U. S. Geological and Geographical Survey made their headquarters at this agency last season. In the party was a competent topographer, furnished with suitable instruments for correct observation. For my information he very kindly took such observation as enabled him to locate the 40th parallel of north latitude which he found to run by a certain flat top hill about a mile and a half north of the agency buildings. This I found to agree very nearly with the

information which I had received from the previous agent, who had in his turn been informed by a survey party that the before-mentioned boundary line which according to treaty lies 15 miles north of the 40° runs about eighteen (18) miles north of the agency.

I had refrained from talking much about the matter with the Indians, speaking only in a general way when questioned by them waiting for and depending upon the promised survey of Mr. J. W. Miller. He has now come and gone; has only confirmed my previous information; has not located the northern boundary; has felt authorized to inform me and certain of the Indians that the line he was running was not the northern boundary; [fol. 22] and also felt authorized to state to me and Indians that their boundary line was from 15 to 18 miles north of the agency. He stated also that upon his return he would advise the propriety of a new survey based upon new and accurate observation.

Under the circumstances I have thought it best to say as little as possible on the subject to the Indians before laying the matter before you.

It must be seen at once that after all the trouble which I have had in regard to this question within the last twelve months, continually putting off the Indians by informing them that Mr. Miller and authority from Washington would come this season and tell them just where their line was, that I now feel very much embarrassed.

I urge the propriety, the absolute necessity at the earliest practicable date of a new survey.

Should we nevertheless all be in the wrong, including the Government maps and should the position of the northeast corner as at present located, and the line just run by Mr. Miller be correct, and it be the purpose of the Department to adopt it, I wish to be informed at once, and be instructed as to my duties in the premises. In this event, however, it will be useless to attempt any more improvements here; the Indians will be driven from the only farming land and from the only stock range which I have as yet seen in this portion of the Reservation and obliged to make their home upon the river forty (40) miles south of here.

I respectfully ask an early answer to this letter.

8. On November 19, 1875, the Commissioner of Indian Affairs wrote to the Secretary of the Interior as follows:

> I am advised by H. B. Denman, Esq., Attorney for J. W. Miller, under date of the 17th instant, that the recent survey of the north boundary of the Ute Indian Reservation in Colorado Territory, made by Mr. Miller, under his contract with the General Land Office, develops the fact that the White River and surrounding valleys as well as the Agency buildings and improvements at the White River Agency lie north of the said boundary and consequently are not within the limits of the said Ute Reservation.
>
> In view of these facts I have the honor to recommend that the President be requested to issue an order withdrawing all that tract of country lying between the north boundary of the Ute reservation as defined in [fol. 23] treaty of March 2, 1868 (Stat. at L., vol. 15, p. 619) and the 1st standard parallel north and setting apart the same as an addition to the present Ute Indian Reservation.
>
> I enclose herewith a draft of such an order and a portion of the map of Colorado.

9. On November 20, 1875, the Secretary of the Interior made the following recommendation to the President:

> Concurring in the recommendation of the Commissioner of Indian Affairs, contained in the accompanying report, dated the 19th instant, I have the honor to request the signature of the President to the enclosed draft of an Executive Order, withdrawing from sale all that tract of country lying between the north boundary of the Ute Reservation, as defined in treaty of March 2, 1868, and the 1st standard parallel, north; and setting apart the same, as an addition to the present Ute Indian reservation in the Territory of Colorado.

10. On November 22, 1875, the President issued the following Executive Order:

> It is hereby ordered that the tract of country, in the Territory of Colorado lying within the following described boundaries, viz:
>
> "Commencing at the northeast corner of the present Ute Indian Reservation as defined in Treaty of March

2, 1868 (Stats. at Large, vol. 15, p. 619) thence running north on the 107th degree of longitude to the first standard parallel north; thence west on said 1st standard parallel to the boundary line between Colorado and Utah; thence south with said boundary to the northwest corner of the Ute Indian reservation, thence east with the north boundary of the said reservation to the place of beginning,"

be and the same hereby is, withdrawn from sale and set apart for the use of the several tribes of Ute Indians, as an addition to their present reservation in said Territory.

11. On November 24, 1875, the Commissioner of Indian Affairs wrote to E. H. Danforth, the agent at the White River Agency, as follows:

Referring to your letter of the 21st ultimo, respecting the location of the north boundary of the Ute Indian [fol. 24] reservation in Colorado and the object of the recent survey made by Mr. John W. Miller, you are advised that Mr. Miller was authorized to make the survey in question and on its completion the facts in the case were promptly reported to the Department by H. B. Denman, Esq., attorney for Mr. Miller.

Upon the recommendation of this office an order was issued by the President on the 22nd instant (copy herewith) withdrawing from sale or entry all that tract of country lying between the north boundary of the Ute reservation as defined in treaty of March 2, 1868 (St. at Large, vol. 15, p. 619) and which was the boundary surveyed by Mr. Miller—and the 1st standard parallel north, and setting apart the same as an addition to the present Ute Indian reservation.

This action fully protects your Indians in the peaceable possession of their improvements in the White River valley and the Agency buildings, and will enable you to assure the Indians of the exact location of the limits of their reservation as enlarged.

I enclose for your information a portion of the map of Colorado showing the portion withdrawn as the addition to the reserve.

12. By an agreement between the plaintiffs and the United States of March 6, 1880, amended, ratified and confirmed by

the act of June 15, 1880 (21 Stat. 199; 1 Kappler 180), and thereafter ratified by the Indians, the plaintiff Indians sold their reservation to the United States, except certain lands retained by them for their own use, and the United States undertook to sell the lands not retained by the Indians, and, after certain stipulated payments, to deposit the proceeds in the Treasury of the United States for the benefit of the Indians. By section 3 (21 Stat. 203, 204) it was provided that certain allotments in severalty should be made to plaintiffs and that:

> * * * all the lands not so allotted, the title to which is, by the said agreement of the confederated bands of the Ute Indians, and this acceptance by the United States, released and conveyed to the United States, shall be held and deemed to be public lands of the United States and subject to disposal under the laws providing for the disposal of the public lands, at the same price and on the same terms as other lands of like character, except as provided in this act: *Provided*, That none of said lands, whether mineral or otherwise, [fol. 25] shall be liable to entry and settlement under the provisions of the homestead law; but shall be subject to cash entry only in accordance with existing law; and when sold the proceeds of said sale shall be first sacredly applied to reimbursing the United States for all sums paid out or set apart under this act by the government for the benefit of said Indians, and then to be applied in payment for the lands at one dollar and twenty-five cents per acre which may be ceded to them by the United States outside of their reservation, in pursuance of this agreement. And the remainder, if any, shall be deposited in the Treasury as now provided by law for the benefit of the said Indians, in the proportion hereinbefore stated, and the interest thereon shall be distributed annually to them in the same manner as the funds provided for in this act: * * *

The preamble to the said act of June 15, 1880 (21 Stat. 199) was in part as follows:

> Whereas certain of the chiefs and headmen of the confederated bands of the Ute tribe of Indians, now present in the city of Washington, have agreed upon and submitted to the Secretary of the Interior an agree-

ment for the sale to the United States of their present reservation in the State of Colorado, their settlement upon lands in severalty, and for other purposes; * * *

The original offer or agreement (21 Stat. 200) had also provided that:

> The said chiefs and headmen of the confederated bands of Utes also agree and promise to use their best endeavors with their people to procure their consent to cede to the United States all of the territory of the present Ute Reservation in Colorado, except as hereinafter provided for their settlement.

13. By Sections 1 and 2 of the act of July 28, 1882 (22 Stat. 178; 1 Kappler 205) it was provided:

> That all of that portion of the Ute Indian Reservation in the State of Colorado lately occupied by the Uncompahgre and White River Utes be, and the same is hereby, declared to be public land of the United States, and subject to disposal from and after the passage of this act, in accordance with the provisions and under the restrictions and limitations of section three of the act of Congress approved June fifteenth, eighteen [fol. 26] hundred and eighty, chapter two hundred and twenty-three, except as hereinafter provided, under regulations to be prescribed by the Secretary of the Interior in accordance with the provisions of this act.
>
> Sec. 2. That the Secretary of the Interior shall, at the earliest practicable day, ascertain and establish the line between the land mentioned in section one of this act and that now or lately occupied by the Southern Utes in said State; and * * *

The above Act was passed merely to remove the doubts which some settlers had as to their right to make entry and obtain patents.

14. On August 2, 1882, the Commissioner of Indian Affairs made the following recommendation to the Secretary of the Interior:

> Referring to the act of Congress, approved July 28, 1882, declaring the lands lately occupied by the Un-

> compahgre and White River Ute Indians, in Colorado, to be public lands of the United States, etc., I have the honor to recommend that the lands set aside by Executive Order of November 22, 1875, for the use of the several tribes of Ute Indians, be restored to the public domain.
>
> . . . . . .
>
> I enclose a draft of an Executive Order for the purposes herein indicated, and respectfully recommend that the same be laid before the President for his signature.

15. On August 4, 1882, the following Executive Order was issued:

> It is hereby ordered that the following described tract of country in Colorado, viz: "Commencing at the northeast corner of the present Ute Indian Reservation, as defined in the treaty of March 2, 1868, (Stats. at Large, vol. 15, p. 619), thence running north on the 107th degree of longitude to the first standard parallel north; thence west on said first standard parallel to the boundary line between Colorado and Utah; thence south with said boundary to the northwest corner of the Ute Indian Reservation; thence east with the north boundary of the said reservation to the place of beginning," withdrawn from sale and set apart for the use of the several tribes of Ute Indians by Executive Order dated November 22, 1875, be, and the same hereby is restored to the public domain. . . .

[fol. 27] 16. The lands restored to the public domain by the Executive Order quoted in finding 15 were opened to entry as public lands of the United States, and the moneys received from the sale thereof were deposited in the Treasury of the United States to the credit of the fund "Sales of Public Lands," and were not credited, or accounted for, to the Indians.

17. By the Act of March 3, 1909 (c. 263, 35 Stat. 781, 788-789), Congress, in order to carry into effect the agreement ratified by the Act of June 15, 1880 (c. 223, 21 Stat. 199), conferred power on the Court to hear, determine, and render final judgment on the "claims and rights" of the

Ute Indians (plaintiffs in this case) under that agreement "including the value of all lands ceded by the said Indians which have been set apart and reserved from the public lands as public reservations * * *." Pursuant to the jurisdiction so conferred, the same plaintiffs now in suit instituted an action seeking recovery for the failure of the United States to dispose of the lands ceded by the agreement of 1880, for an accounting for the lands sold, and to recover compensation for the lands reserved by the United States for public purposes. The plaintiffs recovered a judgment for the proceeds of the cash sales of the land sold, plus the value of land reserved for public purposes, less offsets and deductions. None of those lands lay north of the true north boundary of the reservation as described in the treaty of March 2, 1868 (15 Stat. 619). A supplemental judgment included additional sums received by the defendant up to July 1, 1910.

Conclusion of Law

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that plaintiffs are not entitled to recover and their petition is, therefore, dismissed.

Opinion

Whitaker, *Judge*, delivered the opinion of the court:

The issue in this case is over the defendant's liability to account for the sale of certain lands added to plaintiffs' reservation by Executive Order.

[fol. 28] On March 2, 1868, the parties entered into a treaty under the terms of which the plaintiffs ceded to the defendant all the lands to which they laid claim, except those in the southwest section of the present State of Colorado. The lands reserved were bounded on the east by the 107th parallel of west longitude, on the south by the southern boundary of the State of Colorado, on the west by the western boundary of that State, and on the north by a line drawn due east from the western boundary beginning at a point 15 miles north of the 45th parallel of north latitude.

Not until more than seven years later was any attempt made to designate on the ground the northern boundary;

but in the meantime the defendant, pursuant to the treaty, established an agency on the White River at a place it thought was south of the northern boundary line of the reservation. The Indians believed that the northern boundary was far to the north of the location of this agency; and so, when some miners began working on Douglass Creek in Wyoming, they protested, because they said this was within the limits of their reservation. Later, they protested the location of a wagon road north of the White River agency, because they said this was within the limits of their reservation.

When in 1875 a survey showed that the northern boundary was south of this agency the Indians manifested considerable dissatisfaction. In order to pacify them, the President, on the recommendation of the Commissioner of Indian Affairs and the Secretary of the Interior, by Executive Order in 1875, withdrew from sale and set apart for the use of the plaintiff tribe certain lands north of the northern boundary "as an addition to the present reservation in said territory." "This action," the Commissioner of Indian Affairs wrote to the Indian Agent, "fully protects your Indians in the peaceable possession of their improvements in the White River valley and the Agency buildings, and will enable you to assure the Indians of the exact location of the limits of their reservation as enlarged."

In September 1879 some of the White River Utes massacred the Indian Agent and all the agency's male employees and others, and ambushed and killed a small detachment of soldiers. The chiefs and headmen of the [fol. 29] tribe were summoned to Washington for the purpose of bringing about the apprehension of the guilty parties and of securing an agreement from them for the cession of their reservation. An agreement was secured to cede to the United States all of their reservation, except certain lands that were to be allotted to them in severalty. All the lands not allotted in severalty the defendant agreed to sell for the account of the Indians. This agreement was ratified by Congress on June 15, 1880 (21 Stat. 199).

The question presented is whether or not there was included in the lands to be sold for the account of the Indians those lands which were added to the reservation by Executive Order in 1875.

The parties agree that the Indians secured no title to these lands by virtue of the Executive Order alone,[1] but plaintiffs say that the President's action in adding them to the reservation was ratified by Congress by the Act of June 15, 1880. Plaintiffs say that in the preamble to this Act it is recited that the chiefs and headmen of the confederated bands of the Ute Tribe of Indians had agreed upon a sale to the United States "of their *present* reservation in the State of Colorado," (italics ours) and that the agreement itself recites that the chiefs and headmen agreed to use their best efforts to get their people to consent to the cession to the United States of "all the territory of the *present* Ute Reservation in Colorado." They say that at the time the chiefs and headmen entered into this agreement they believed that the lands added to their reservation by Executive Order were legally a part of their reservation and that, therefore, it is evident that it was their intention to convey these lands to the United States, as well as their other lands, and, therefore, it follows that they understood that the United States was agreeing to sell for their account these lands along with their other lands.

In all probability this is true. The Indians were no doubt ignorant of the legal requirements for vesting title in them to a part of the public lands, and so, when they were informed by the Indian Agent that these lands had been added to their reservation, they in all probability believed that [fol. 30] they were as much a part of their reservation as were the lands set aside by the treaty of March 2, 1868. So, when these chiefs and headmen entered into the agreement ratified by the Act of June 15, 1880, they no doubt believed that they were ceding to the United States these lands as well as others.

However, the essential thing in order to charge the United States is that it should have agreed to sell these lands for the account of the Indians. If it did not, it is not liable for not having done so, whatever the Indians may have thought it had agreed to do.

The agreement of the United States is set forth in the Act of June 15, 1880. That Act in its preamble says that the chiefs and headmen of the Ute Tribe had presented an agreement to the Secretary of the Interior, and that the

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[1] *Sioux Tribe of Indians* v. *United States*, 316 U. S. 317.

President had submitted the agreement to Congress "for acceptance and ratification." Congress ratified it with certain provisos not material here. The agreement, which is set out in full in the Act, provided for a cession of the Ute reservation to the United States in consideration of which the United States agreed to do certain things which were enumerated. These were to make certain allotments, to pay a certain amount of annuities, to provide agricultural lands and farming equipment, to educate their children, and to continue in force the treaty of 1868 and the agreement which was ratified by the Act of April 29, 1874. Nothing was said in the agreement about a sale of the ceded lands for the Indians' benefit, but Congress added an agreement to that effect in section 3 of the Act of June 15, 1880. This reads in part:

> * * * and all the lands not so allotted, the title to which is, by the said agreement of the confederated bands of the Ute Indians, and this acceptance by the United States, released and conveyed to the United States, shall be held and deemed to be public lands of the United States, and subject to disposal under the laws providing for the disposal of the public lands, at the same price and on the same terms as other lands of like character, except as provided in this Act: * * *.

The Act then proceeds to set forth what shall be done with the money derived from the sale of the lands.

[fol. 31] It will thus be seen that the United States agreed to sell for the account of the Indians only those unallotted lands "the title to which is, by the said agreement of the confederated bands of the Ute Indians, and this acceptance by the United States, released and conveyed to the United States." This did not include the lands added to the reservation by Executive Order because the Indians did not have title to these lands and, hence, title to them was not conveyed by the agreement referred to. The United States agreed to sell for the account of the Indians only those lands the title to which was conveyed to them by this agreement.

At the time Congress ratified this agreement, it must have known of the addition to the reservation by Executive Order and, hence, purposely, it limited its agreement to sell the Indians' lands for their account to those lands the title to which was conveyed by the agreement. It evidently meant

to exclude the lands the Indians had been occupying under the Executive Order, but to which they had no title.

The Indians proposed to cede their "present reservation"; Congress knew they probably considered these Executive Order lands a part of their "present reservation," and so it was careful to limit its agreement to sell for the Indians' account those lands to which the Indians had title. It did not mean to ratify and confirm the President's action in setting apart these lands "as an addition to their present reservation in said Territory," and it plainly said so.

Whether this was explained to the Indians we do not know, but it is plain that Congress did not intend to agree that these Executive Order lands should be sold for the Indians' account, and, in the absence of such an agreement, the defendant is not liable for not having done so.

The parties charged with carrying out the Act so construed it. On August 2, 1882, the Commissioner of Indian Affairs recommended to the Secretary of the Interior, "that the lands set aside by Executive Order of November 22, 1875, for the use of the several tribes of Ute Indians, be restored to the public domain." This was done by Executive Order on August 4, 1882. Had the Commissioner and the Secretary of the Interior and the President believed that Congress had intended by the Act of June 15, 1880 to vest [fol. 32] title in the Indians to these Executive Order lands and had agreed that these lands should be sold for the account of the Indians, they would not have withdrawn them from the reservation and restored them to the public domain.

We are clearly of the opinion that the Indians never did acquire title to these Executive Order lands and that the Congress never did agree to sell them for the account of the Indians.

The view we take on the merits makes it unnecessary for us to consider the other defenses raised by the defendant.

Plaintiffs' petition will be dismissed. It is so ordered.

Jones, Judge, and Whaley, Chief Justice, concur.

Concurring Opinion

Littleton, Judge, concurring:

I concur in the decision that plaintiff bands (hereinafter sometimes referred to as plaintiff) are not legally entitled

to recover compensation as for a taking of the rectangular strip of land in controversy. This land is situated between the first standard parallel north and a line running due west from a point on the 107th meridian fifteen miles due north of where said meridian crosses the fortieth parallel of north latitude. Plaintiff insists that when the treaty of March 2, 1868, was made and ratified it was believed and intended by the parties that this disputed area of land was included within the reservation as defined by the treaty of March 2, 1868, 15 Stat. 619. The strip of land in question is approximately three miles wide and about one hundred and eight miles long.

I do not understand from plaintiff's brief and oral argument that it is agreed that the Ute Indians did not acquire Indian title to this land by virtue of the treaty and the Executive Order of November 22, 1875, quoted in finding 10.

What plaintiff concedes is that where a treaty did not intend to give possessory Indian title and where the President by Executive Order simply withdraws public land belonging to the United States from entry or sale under the land laws of the United States and reserves it for Indian purposes as a part of a reservation, such as was done in the case of the *Sioux Tribe of Indians* v. *United States*, 316 U. S. [fol. 33] 317, the Indians do not acquire thereby an exclusive use and occupancy Indian title as against the United States. However, plaintiff's claim of exclusive use and occupancy title against the United States to the strip of land here in controversy is grounded upon the claim by the Ute Indians that the parties to the treaty of 1868 intended by art. 2 thereof that an east and west line from "a point fifteen miles due north of where said meridian [107° of longitude west from Greenwich] intersects the fortieth parallel of the north latitude" should include this controverted strip of land in the reservation because it was, for the most part, in the White River Valley, which valley the Indians desired to retain and which the Government intended they should have. In other words, plaintiff bands contend that they understood and intended that the point fifteen miles due north of where the 107th meridian intersects the fortieth parallel was farther north than where that point was finally, many years later, found to be. The true north boundary line of the reservation was not surveyed and established prior to the cession agreement of March 6, 1880.

Plaintiff insists that by reason of this situation and the controversy which had existed up to the date of the Executive Order as to the intended location of the true north boundary line under the 1868 treaty, the protests of the White River Ute Indians prior to and in October 1875, when J. W. Miller made a survey in October 1875 of an east-west line from a point on the 107th meridian near the fortieth parallel of north latitude to the western boundary line of the Ute Reservation, and the letters written by the Indian Agent at the White River Agency, the President by said Executive Order of November 22, 1875, settled the dispute as to the correct north boundary line of the reservation and included the strip of land in controversy as a part of the reservation, as intended by the treaty.

Plaintiff contends that from and after the date of the Executive Order in 1875 the tribe understood and claimed, as it had theretofore understood and claimed, that the true north line of the reservation as intended in art. 2 of the treaty of 1868 included the land in question in the reservation as stated in the Executive Order and that after the issuance of the Executive Order no controversy as to the north boundary line of the reservation existed between the parties. [fol. 34] Plaintiff further insists that since the land in controversy was thus regarded and intended by both parties to be a part of the treaty reservation belonging to plaintiff tribe they understood and intended that such land was to be included in the territory to be released and ceded by the cession agreement of March 6, 1880, in which the Indians agreed to release and cede "to the United States all the territory of the present Ute Reservation in Colorado."

Plaintiff therefore claims that when Congress by the act of June 15, 1880, 21 Stat. 199-205, accepted and ratified this agreement without material change, describing it in said act as "an agreement for the sale to the United States of their present reservation in the State of Colorado," and in enacting certain provisions in said act for carrying out said agreement, which act was submitted to, accepted, and ratified by the Ute Tribe, as required by sec. 10 of said act, the Congress accepted and ratified the intention and understanding of plaintiff and the United States as to the true north boundary line of the reservation under the treaty of 1868 as expressed and established in said Executive Order of November 22, 1875.

For the reasons stated plaintiff bands take the position that they acquired and had under the treaty and the Executive Order, and when the agreement of 1880 was made and ratified, exclusive use and occupancy title to the land in controversy and became entitled under sec. 3 of said ratification act of June 15, 1880, which they accepted, to the proceeds from the sale of this strip of land, as from the sale of other land of the reservation after the reimbursements to the United States, as mentioned therein.

In addition to the official correspondence quoted in the findings, the following letters taken from Senate Executive Document No. 29, January 7, 1880, 46th Congress, 2d Session, pp. 41-45, are pertinent:

White River Indian Agency,
White River, Colo., May 7, 1877.

SIR:

I have to advise you that the matter of the coming in upon the Ute Reservation by white persons to settle and to prospect for gold is being agitated by some parties in the country about.

[fol. 35] The very unfortunate mistakes made by Mr. Miller in his *intended* survey of the northern boundary of the Ute Reserve has led to much talk and discussion as to the rights of the Ute Indians to the White River Valley. It is due to the Indians of this reserve, and to the quiet and well being of the white settlements near, that this agitation should cease; that the mistake made by Mr. Miller should be officially rectified by authorities in the Land Office; that correct maps indicating the true position of the northern boundary of the Ute Reserve in Colorado should be circulated, sent for distribution to Denver, Middle Park, and to other places.

The treaty plainly states that the northern boundary shall be a line fifteen miles north of the fortieth parallel of latitude. All the authorities of the "Hayden Survey," and of all maps which I have seen, place the fortieth parallel about two miles north of the location of this agency. Mr. Miller ran his line for the northern boundary one-half a mile south of this agency, making a mistake of about seventeen and a half miles.

I ask whether I will be supported if I endeavor to remove persons coming upon the reserve to settle or to

"prospect"; and where I am to look for assistance to do so.

Very respectfully, your obedient servant, E. H. Danforth, United States Indian Agent.

Hon. J. Q. Smith, Commissioner of Indian Affairs, Washington, D. C.

Department of the Interior,
Office of Indian Affairs,
Washington, May 23, 1877.

SIR:

Respecting the question of the occupancy of the White River Valley, in the northern portion of the Ute Reservation in Colorado, referred to in your letter of the 7th instant, you are advised that any person settling upon lands in Colorado south of the first standard parallel between the 107th degree of west longitude and the west boundary of Colorado since the 22d of November 1875, is there in violation of law, and subject to removal under sections 2147 to 2151, both inclusive, of the Revised Statutes. If a removal is deemed necessary, you will report the facts to this office that proper action may be taken in the premises.

The question of the right of occupancy is not affected by the accuracy of Mr. James W. Miller's survey. That question is settled by an executive order, dated Novem-[fol. 36] ber 22, 1875, whereby all the land between the 107th degree of west longitude and the western boundary of the State, as far north as the first standard parallel, was withdrawn from settlement and set apart as an addition to the Ute Reserve.

The first standard parallel has been surveyed and its location properly marked by regulation mounds or monuments, and is at least 25 miles north of the agency buildings.

I send you, for the files of your office, another copy of said executive order with copy of office letter of November 24, 1875, transmitting a copy thereof.

Very respectfully, S. A. Galpin, Acting Commissioner.

E. H. Danforth, Esq., United States Indian Agent, White River Agency, Colorado.

In replying to the letter of the Commissioner of May 23, Agent Danforth on June 11, 1877, wrote the Commissioner, in part, as follows:

White River Indian Agency,
White River, Colo., June 11, 1877.

SIR:

I am in receipt of your letter of the 23d of May, in reply to my letter of May 7, asking for instructions as to the course I should pursue in case parties make an effort to settle in the northern portion of the Ute Reserve near my agency.

* * * * * * *

The Utes fully believe that they have been deprived, unjustly, of part of their lands in the southern portion of their reserve, and from what I have been able to learn on the subject, I think the facts in the case justify their belief and the correctness of their statement that white settlers are at present occupying and farming their land. From what I see of the disposition and wishes of the white people in the neighborhood of the northern portion of the reservation, they would gladly deprive the Utes of this country, and that they are preparing to take the first steps to accomplish it I am satisfied. Efforts are being made to raise colonies to settle in the White River Valley; one party of about sixty families is reported *en route*. I have a letter from the leader of another party, asking me for information and directions.

There is already one party upon the reserve, hunting and prospecting for gold. The settlers of the neighbor- [fol. 37] ing valleys are loud in their talk that they have a perfect right to come and settle here, and are proposing to do so. Much of this discussion has arisen, as I said before, no doubt, from the mistakes of the Miller survey. It continually comes to me that members of this party were very free in declaring in their progress through the country that this agency was off the reservation, and the entire White River Valley was not Indian country. I repeat here, most decidedly, that it is the duty of the Indian Office, through the Land Office, or in some other way, to publish *very widely* throughout Colorado, and very soon, too, the true

boundaries of this reservation, and to circulate correct maps indicating the same to the eye. A little care taken *now* in this direction will save a great deal of trouble to Indians and whites, and to the authorities of the country in future.

* * * * * * *

Very respectfully, your obedient servant, E. H. Danforth, United States Indian Agent.

Hon. J. Q. Smith, Commissioner of Indian Affairs, Washington, D. C.

Thereafter, on July 5, 1877, the Commissioner of Indian Affairs wrote the Secretary of the Interior in part, as follows:

SIR:

I have the honor to submit herewith, for your consideration and instruction, copy of a letter of the 11th ultimo from E. H. Danforth, United States Indian agent for the White River Ute Reservation in Colorado, complaining of the defiant intrusion of unauthorized white persons upon the northern portion of said reservation, particularly the White River Valley, and of his inability to effectually check or control them.

There is no military post near said agency, and it is not, therefore, practicable for the agent to obtain the aid of troops upon his own application, and without such assistance he is helpless to prevent the disregard of the territorial rights of said Indians by the intruders in question. The Utes are well known as a brave and warlike tribe, and, although now entirely peaceful, the danger as well as injustice of permitting a flagrant violation of their clear treaty rights is very evident.

The pretext and only possible color of excuse for the intrusion complained of is found in the Miller survey of the northern boundary of said reservation, executed in 1874, which delineated said boundary as south of the [fol. 38] fortieth parallel of north latitude, instead of fifteen miles north thereof, as provided by treaty of March 2, 1868 (15 Stats., 619), and clearly defined by Hayden's geographical survey of that region, which latter survey was based upon observations of latitude and longitude and seems to conform strictly to the treaty.

Prior to the Miller survey the Indians were in undisputed possession of the White River Valley as an unquestioned portion of their reservation, but thereafter, and under color thereof, the whites began the encroachments which have at last obtained such magnitude as to demand early attention. In this connection I respectfully recommend that steps be taken to secure a resurvey in lieu of that executed by Miller, so as to conform to the boundaries defined in the treaty, and thereby remove all possible pretense for unauthorized intrusion upon the reservation. It is recommended, however, that the General Land Office be directed to instruct the register and receiver of the proper district to give public notice that all lands withdrawn by said executive order are reserved as Indian lands, and are not, therefore, regarded as a part of the public domain for any purpose whatever, and that white settlers thereon are trespassers, and will be removed by the government, with the aid of the military, if necessary.

* * * * * * *

In view of all the circumstances and the grave public interests involved, it is suggested that it may be advisable to submit the matter to the President, with the recommendation that a military force be sent to the White River Valley to insure the faithful observance of the treaty stipulations with the Utes, by removing and keeping away from their reservation all unauthorized persons.

From a study of the record in connection with plaintiff's contentions as to the intention of the treaty of 1868, the Executive Order of November 22, 1875, and the ratification act of June 15, 1880, I am led to the conclusion that the Executive Order of November 22 was not issued and was not intended, in the circumstances disclosed, to settle a controversy as to the true north boundary line of the Ute Reservation, as intended by art. 2 of the treaty of 1868. In other words, I think the record does not show that in issuing this Executive Order the Government was interpreting art. 2 of the treaty for the purpose of fixing the first standard [fol. 39] parallel north as the true north boundary line of the reservation as intended by art. 2 of the treaty of 1868. The language of the Executive Order of November 22 con-

tains the usual language employed in such Executive Orders where public lands are withdrawn from sale and set apart for temporary use for Indian purposes. The language used in the Executive Order of November 22 is the same, or substantially the same, as the language contained in the Executive Order involved in the case of the *Sioux Tribe of Indians* v. *United States*, *supra*. When the agreement of March 6, 1880, was negotiated and made in Washington by the Secretary of the Interior with the chiefs and headmen of plaintiff bands, in which these Indians agreed to use their best efforts to procure the consent of the Ute Indians to cede to the United States "All the territory of their present Ute Reservation in Colorado," and when the Congress accepted and ratified that agreement and provided, in section 3 of the act, for the sale of the ceded lands, it was understood and intended, at least so far as the Government was concerned, that the lands being ceded, and which would be sold for the benefit of the Indians, were those lands of the Ute Reservation as defined by art. 2 of the treaty of March 2, 1868, *supra*, less the part of such reservation in the southern portion thereof which had previously been ceded or sold to the United States under an agreement of September 13, 1873, ratified April 29, 1874, 18 Stat. 36. See Senate Executive Doc., No. 114, March 10, 1880, 46th Cong., 2nd sess.; House Report No. 1401, May 11, 1880, 46th Cong., 2nd sess.

I am unable to find in the record sufficient evidence to support the conclusion that when the Indians made the agreement on March 6, 1880, and thereafter formally accepted the ratification thereof by Congress it was the clear understanding and intention of the parties that the reservation being ceded included any land other than the territory embraced within the north boundary line as specifically defined by art. 2 of the treaty of 1868.

Since, as I have stated above, the President did not, in my opinion, intend by the Executive Order of November 22, 1875, to interpret the treaty and to fix the correct location of the true north boundary line of the reservation at a place other than that called for by the specific language of the treaty, [fol. 40] and since the language of the Executive Order and the circumstances under which it was issued did not justify the Indians in believing that the President was interpreting the treaty and establishing the true north boundary line under the treaty, the plaintiff bands are not legally entitled to recover in this case.

The facts as disclosed by the official correspondence before and after the date of the Executive Order of November 22, 1875, with reference to the relations and dealings between the Government and the Indians of plaintiff bands in the north portion of the Ute Reservation indicate that the purpose and reason for the issuance of the Executive Order of November 22, 1875, was to withdraw from public entry or sale such an area of land at the north end of the Ute Reservation for temporary use for Indian purposes as would enable the Indian Agent at the White River Agency to keep white gold prospectors and settlers from intruding upon the Ute Reservation as defined by the treaty of 1868.

In his letter of May 7, 1877, *supra*, the agent at the White River Agency complained about intrusion upon the Ute Reservation by white settlers and gold prospectors and stated that the line, as surveyed by J. W. Miller, was about seventeen and a half miles south of the true north boundary line of the treaty, fifteen miles north of the fortieth parallel latitude. In his report of May 23, 1877, the Commissioner of Indian Affairs pointed out that the first standard parallel had been surveyed and its location properly marked, and that the area encompassed in the Executive Order for occupancy by the Indians was at least twenty-five miles north of the agency buildings.

The above conclusion that the Executive Order of November 22, the language of the agreement of 1880, and its ratification by Congress, did not vest in plaintiff bands exclusive use and occupancy title to the strip of land in controversy is supported by reference to an Executive Order issued by the President August 17, 1876, with reference to a boundary dispute which arose under the terms of the agreement of September 13, 1873, approved April 29, 1874, *supra*, in which the President did, on behalf of the United States, interpret the treaty and exclude from the cession certain land which, [fols. 41-42] according to the lines specified in the agreement, would have been included in such cession. This Executive Order was as follows:

> It is hereby ordered that all that portion of country in the State of Colorado lying within the following-described boundaries and forming a part of the Uncompahgre Park, namely, commencing at the fifty-third mile-post on the north line of the survey of the boundaries of the Ute cession, executed by J. W. Miller in 1875; thence south four miles; thence east four miles; thence

north four miles to the said north line; thence west to the place of beginning, be, and the same hereby is, withdrawn from the public domain, and set apart as a part of the Ute Indian reservation, in accordance with the first article of an agreement made with said Indians, and ratified by Congress April 29, 1874. (Stats. at Large, vol. 18, p. 36.)

For the reasons stated, I concur in the decision dismissing the petition.

MADDEN, Judge, took no part in the decision of this case.

[fols. 43-44] JUDGMENT

At a Court of Claims held in the City of Washington on the 4th day of March, A. D., 1946, judgment was ordered to be entered as follows:

Upon the special findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law, that plaintiffs are not entitled to recover.

It is therefore adjudged and ordered that plaintiffs' petition be and the same is hereby dismissed.

[fol. 45] Clerk's Certificate to foregoing transcript omitted in printing.

Endorsed on Cover: Enter John W. Cragun. File No. 51,004. Court of Claims. Term No. 1301. The Confederated Bands of Ute Indians, Petitioners, vs. The United States. Petition for writ of certiorari and exhibit thereto. Filed June 3, 1946. Term No. 1301 O. T. 1945.

[fol. 46] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1946

No. 141

ORDER ALLOWING CERTIORARI—Filed October 14, 1946

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

JUN 3 1946

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 141

THE CONFEDERATED BANDS OF UTE INDIANS,
Petitioners,

vs.

THE UNITED STATES

TITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

ERNEST L. WILKINSON,
JOHN W. CRAGUN,
FRANCIS M. GOODWIN,
Counsel for Petitioners.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 141

THE CONFEDERATED BANDS OF UTE INDIANS,
Petitioners,

vs.

THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Confederated Bands of Ute Indians, by their attorneys, pray that a writ of certiorari issue to review the judgment of the Court of Claims of the United States entered in the above case on March 4, 1946.

Opinions Below

The opinion of the Court of Claims is as yet unreported but appears in the record at R. 11-38.

Jurisdiction

The judgment of the Court of Claims was entered March 4, 1946 (R. 43). The jurisdiction of this Court is invoked

under § 3(b) of the Act of February 13, 1925, c. 229, 43 Stat. 936, 28 U. S. C. § 288, as amended by the Act of May 22, 1939, c. 140, 53 Stat. 752.

The special jurisdictional act under which this case was instituted in the court below was the Act of June 28, 1938, c. 776, 52 Stat. 1209 (R. 5), as amended by the Acts of July 15, 1941, c. 299, 55 Stat. 593 (R. 10), and June 22, 1943, c. 135, 57 Stat. 160. The jurisdictional act contains no special provision for review on appeal to this Court. The provision of the Act of February 13, 1925, above, governing this Court's review of cases in the Court of Claims (28 U. S. C. § 288), under which this Court is authorized to review "*any case* in the Court of Claims", confers jurisdiction on this Court to review this case. *United States* v. *Esnault-Pelterie*, 299 U. S. 201, 202-3 and note 3.

Questions Presented

1. A tribe of Indians ceded their reservation to the United States as trustee, the lands to be sold for the benefit of the Indians. To the knowledge of the United States, the Indians understood the cession as encompassing lands which at the time of the cession were a part of their reservation, having been made a part of it by an Executive order which had been proclaimed to settle a dispute between the Indians and the United States as to the territory reserved to the Indians by an earlier treaty with the United States. Is the United States liable for taking the Executive-order lands to its own use and profit, instead of selling them for the benefit of the Indians under the agreement?

Where a tribe of Indians reasonably understands its agreement with the United States in one way, and the United States understands it differently, which understanding of the agreement shall prevail?

2. Whether the Act of June 15, 1880, constituting an agreement between petitioners and respondent, has been properly construed.

3. Whether *Sioux Tribe* v. *United States*, 316 U. S. 317, (holding that an Executive order establishing an "Indian reservation" for the sole purpose of excluding liquor peddlers from the primary reservation of the Indians inferred no compensable interest in the Executive-order lands upon the Indians), can be applied, in order to excuse the United States from liability for taking the lands, to a case in which the Executive-order reservation was established in settlement of claims of the Indians to lands reserved by them under an earlier treaty, and where the Indians used and occupied the Executive-order lands and made a formal cession of all their lands in trust to the United States for sale for the benefit of the Indians.

4. Whether good faith in keeping the formal obligations of the United States to the Indians does not require review of this case on certiorari.

Statutes Involved

The material portions of the statutes involved are set forth in the record, as indicated.

Statement

This is a suit to recover for the taking of lands belonging to petitioners. In 1868 the parties entered into a treaty by which petitioners, after ceding a large area of their land, reserved certain areas in western Colorado for their own use. The north boundary line of the 1868 treaty reservation was not definitely located; and the first survey for that purpose was not made by the government until

1875. This survey disclosed what both parties believed to be a mistake as to the location of that boundary, both parties having understood it to lie farther north. To correct the location of that boundary, an Executive order was promulgated in 1875, adding to the reservation a strip of land about nine miles wide across the north end of the existing reservation. In 1880, by agreement ratified by Congress and by petitioners, it was provided that petitioners would give up their "present reservation" (which included the strip of land added by the Executive order), in return for which the United States agreed to make certain payments and provide other benefits for petitioners, sell the lands to which the United States acquires title, reimburse itself, and pay the balance of the proceeds of the lands to petitioners. Petitioner Indians understood that the Executive-order lands were part of their reservation which they owned and were ceding. Notwithstanding the undertaking by respondent to sell the lands for petitioners' account, an Executive order of August 4, 1882, 1 Kappler 834, restored this strip of land to the public domain. Proceeds of the sale of the acreage within this strip were retained by the United States, which has, since the Executive order of 1882, conducted itself as the proprietor of the lands and without regard to its trusteeship for petitioners under its Agrement of 1880. The Court of Claims held (R. 27-28) that petitioners did not have title to the lands added by the Executive order and therefore that the respondent did not undertake to sell such lands for the account and benefit of petitioners.

In detail, the facts are as follows:

Petitioners are a confederation of various bands of the Ute Tribe of Indians, who, by Treaty of March 2, 1868, 15 Stat. 619, 2 Kappler 990, ceded (Art. 3) all claim to their lands in the United States in exchange for a reservation

(Art. 2) in Colorado, bounded on the east by the 107th meridian, on the south and west by the southern and western boundaries of Colorado, and on the north by a line 15 miles north of the 40th parallel of north latitude. Finding 3, R. 12. The United States, in this treaty (Art. 4), agreed to establish two agencies "on the reservation," one of which, material in the present case, was to be on White River. Finding 5, R. 13.

The White River Agency was established during the latter part of 1869 at a place considered favorable for agency purposes, which was thought by the government and Indians alike to be south of the north boundary line. Finding 5, R. 13.

The Indians believed that their reservation encompassed lands considerably to the north of the agency; for they ordered miners on Douglass Creek [Wyoming], fifty miles north of the reservation, off their lands and complained of a proposed wagon road in the Bear [now Yampa] River Valley in northern Colorado on their own understanding that that was in their country. The agent at the White River Agency persistently requested a survey of the northern boundary in order to set the matter at rest. Finding 6, R. 13-14.

It was not until October or November, 1875—more than seven years after the treaty—that the northern boundary was finally surveyed. The survey showed that the line lay south even of the agency buildings—far south of where the Indians had understood from their treaty, and south even of where respondent's own agents had understood that it lay. Finding 7, R. 16-17. Upon information of these facts being communicated to Washington, the Commissioner of Indian Affairs (Finding 8, R. 19) and the Secretary of the Interior (Finding 9, R. 19) recommended the adoption of an Executive order adding a strip of land [about nine

miles in width] to the northern end of their reservation. The Executive order was promulgated by the President on November 22, 1875 (1 Kappler 834). By it this strip was "set apart for the use of the several tribes of Ute Indians, as an addition to their present reservation" in Colorado. Finding 10, R. 19-20.

The agent at White River was informed of the Executive order, was assured that it "fully protects your Indians in the peaceable possession of their improvements in the White River Valley and the Agency buildings," and would enable him to "assure the Indians of the exact location of the limits of their reservation as enlarged." Finding 11, R. 20. Accordingly, after the adoption of the Executive order was communicated to petitioners in 1875, it was understood by them, just as it was understood by respondent, that the lands added by the Executive order and which both parties had understood were meant to be encompassed by the reservation in the 1868 Treaty, were part of petitioners' reservation.

In this setting, an agreement was entered into between petitioners and respondent on March 6, 1880, whereby petitioners' chiefs and headmen promised to use their best endeavors with their people to procure their consent to cede to the United States all their remaining lands in Colorado, after first providing for individual allotments to the members of petitioner bands. In ratifying this agreement, Congress provided that the lands be sold for petitioners' benefit, petitioners to receive the proceeds of the lands after payment of certain expenses to the United States, etc. (Act of June 15, 1880, c. 223, 21 Stat. 199, 1 Kappler 180). The preamble to the Act recited the agreement by representatives of petitioners "for the sale to the United States of their *present reservation* in the state of Colorado" (21 Stat. 199); the original offer or agreement

likewise provided that petitioners would cede to respondent "all the territory of *the present Ute Reservation in Colorado*" (21 Stat. 200). The agreement proposed by the Act of June 15, 1880, was accepted by petitioners. Finding 12, R. 20-22.

The agreement also provided for allotment of a certain amount of the ceded lands to individual members of the Ute Tribe, prior to the sale by the United States of the remaining lands in the reservation. Subsequently, the lands to be allotted to the individuals not having been selected, doubts existed whether settlers could make entry of the lands in former reservation in Colorado. To remove these doubts, Congress declared by the Act of July 28, 1882, c. 357, 22 Stat. 178, 1 Kappler 205, that the lands formerly occupied by petitioner bands other than those set apart for the Southern Utes by the Agreement of 1880, were "public land of the United States," subject to disposal in accordance with the agreement of 1880. Finding 13, R. 22. No sooner had this act been approved than the Commissioner of Indian Affairs (on August 2, 1882) recommended that the lands described in the Executive order of 1875, and which formed a part of the reservation as ceded under the 1880 agreement, be restored to the public domain. Finding 14, R. 22-23. Thereupon, the President, by Executive order of August 4, 1882, 1 Kappler 834, ordered that the land so set apart and so recognized by the Acts of Congress of June 15, 1880, 21 Stat. 199, and July 28, 1882, 22 Stat. 178, as part of petitioners' reservation, "be, and the same hereby is restored to the public domain." Finding 15, R. 23.

So far as are involved the lands added to petitioners' reservation by the Executive order of 1875, the United States has failed completely in its obligation to hold and sell them for the benefit of petitioners. It restored the

lands to the public domain, and thereafter deposited the moneys from sales thereof to its own use and account in the Treasury; and it has neither credited such moneys, nor accounted for them, to plaintiffs. Finding 16, R. 23. This suit was accordingly instituted to recover for the taking of the Executive-order lands.[1]

The Court of Claims dismissed the petition (R. 24). It correctly stated that the question presented was whether there was included in the 1880 agreement, for sale by respondent for petitioners' benefit, the lands which had been added to the reservation by the 1875 Executive order. But it nevertheless held that while, "when these chiefs and headmen entered into the agreement ratified by the Act of June 15, 1880, they no doubt believed that they were ceding to the United States these lands as well as others" (R. 26), still, the United States undertook to sell only "all the lands not * * * alotted [to the Indians], the title to which is, by the said agreement of the confederated bands of the Ute Indians, and this acceptance by the United States, released and conveyed to the United States." It therefore regarded as the controlling issue whether the Indians had strict title to the lands by virtue of the Executive order. It thought it plain (although it found no evidence beyond the terms of the agreement of 1880 itself on which to base its conclusion) that Congress was "careful to limit its agreement to sell for the Indians' account those lands to which the Indians had title" and that Congress did not mean

[1] Previously, under a jurisdictional act of March 3, 1909, c. 263, 35 Stat. 781, 788-789, petitioners brought suit against the United States for sales of the ceded lands up to that time; and they ultimately recovered a judgment for the proceeds of cash sales and land reserved for public uses, less offsets and deductions up to July 1, 1910. This recovery did not, however, include any lands lying north of the actual boundary of the reservation established under the Treaty of March 2, 1868, and which were involved in the Executive order of November 22, 1875, with which this case is concerned. Finding 17, R. 23-24.

to ratify and confirm the President's action in setting apart these lands as an addition to the 1868 reservation (R. 28). It thought the action of the Commissioner of Indian Affairs and the Secretary of the Interior in recommending the Executive order of 1882 by which the lands were taken from petitioners (of which complaint is here made) to be administrative interpretations of defendants' ownership of the land (R. 27-29).

An opinion by Judge Littleton (R. 28) reflects with somewhat greater accuracy petitioners' position in that court that the Executive order itself accorded a title to petitioners because it merely effected the intent of the parties in the Treaty of 1868 to grant lands to petitioners farther north than what ultimately proved to be the north boundary of the reservation. However, Judge Littleton disagreed that the Executive order did constitute a settlement of the controversy with respect to the territory at the north end of the reservation, but thought that it merely constituted a temporary withdrawal for Indian purposes similar to that involved in *Sioux Tribe of Indians* v. *United States*, 316 U. S. 317—so that all that the Government could have understood and intended in the Agreement of 1880 was that it was acquiring, to be sold for the benefit of petitioners, only those remaining lands assured to the Indians under the Treaty of 1868.

Specification of Errors to Be Urged

The court erred:

1. In holding that the Executive order of November 22, 1875, did not recognize and settle between petitioners and respondent the title of respondents reserved in their lands in Colorado under the Treaty of March 2, 1868.

2. In holding that petitioners did not acquire title to the lands described in the Executive order of November 22,

1875, either by the terms of that order or under the Treaty of March 2, 1868.

3. In holding that under the agreement ratified by Congress by Act of June 15, 1880, the United States did not undertake and agree to hold the lands described in the Executive order of 1875 for sale for petitioners' benefit.

4. In holding that by the agreement ratified by the Act of June 15, 1880, the Executive order of 1875 was not ratified and confirmed as having vested petitioners with title to the lands therein described.

5. In failing to hold that petitioners are entitled to recover.

Reasons for Granting the Writ

1. The Court of Claims held that while the Indians understood they were ceding the lands involved in the 1875 Executive order to the United States and while the United States knew the Indians had that understanding, nevertheless the United States did not intend to *acquire title* to those lands and therefore the United States did not undertake to hold the lands for sale for the benefit of petitioners. The holding of the Court of Claims is in flat conflict with the unbroken rule in this Court that in agreements between Indian tribes and the United States, the understanding of the Indians always prevails.

On the one hand, the Court of Claims held (R. 26):

> "* * * The Indians were no doubt ignorant of the legal requirements for vesting title in them to a part of the public lands, and so, when they were informed by the Indian Agent that these lands had been added to their reservation, they in all probability believed that they were as much a part of their reservation as were the lands set aside by the treaty of March 2, 1868. So, when these chiefs and headmen entered into the agreement ratified by the Act of June 15, 1880, they no doubt

> believed that they were ceding to the United States these lands as well as others."

But while the court acknowledged (R. 28) that "Congress knew they [petitioners] probably considered these Executive Order lands a part of their 'present reservation,'" nevertheless:

> "It evidently meant to exclude the lands the Indians had been occupying under the Executive Order, but to which they had no title."

Notwithstanding the clear understanding of the Indians into which respondent had led them—and the complete reasonableness of it in the circumstances—the court ruled that they were not entitled to recover because (R. 28):

> "We are clearly of the opinion that the Indians never did acquire title to these Executive Order lands and that the Congress never did agree to sell them for the account of the Indians."

To find that the Indians understood that they owned and were ceding to the United States the lands in question, and that the United States knew of that understanding, but that the contrary intent of Congress (as inferred by the court solely from its own interpretation of the agreement) must prevail, is to run flatly into conflict with the rule of this Court holding that in the interpretation of Indian agreements and treaties the understanding of the Indians must prevail. The rule which this Court has stated time out of mind is that a "treaty must * * * be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians." *Jones* v. *Meehan*, 175 U. S. 1, 11-12; *Choate* v. *Trapp*, 224 U. S. 665, 675; *Starr* v. *Long Jim*, 227 U. S. 613, 622, 623; *Marlin* v. *Lewallen*, 276 U. S. 58, 64. "How the words of the treaty were understood

by this unlettered people, * * * should form the rule of construction." *Worcester* v. *Georgia*, 6 Pet. 515, 582; *Choctaw Nation* v. *United States*, 119 U. S. 1, 27, 28. "And we have said that we will construe a treaty with the Indians as 'that unlettered people' understood it, * * *." *United States* v. *Winans*, 198 U. S. 371, 380; *Northern P. R. Co.* v. *United States*, 227 U. S. 355, 366-367; *Seufert Bros.* v. *United States*, 249 U. S. 194, 198. Treaties "are to be construed in the sense in which naturally the Indians would understand them." *United States* v. *Shoshone Tribe*, 304 U. S. 111, 116. "It is our responsibility to see that the terms of the treaty are carried out, so far as possible, in accordance with the meaning they were understood to have by the tribal representatives. * * *." *Tulee* v. *Washington*, 315 U. S. 681, 684-685. This doctrine of construction applies to agreements made with the Indians since March 3, 1871, under R. S. § 2079 (25 U. S. C. § 71), equally with treaties made prior to that date. *Marlin* v. *Lewallen*, 276 U. S. 58, 64.

2. The entire theory of the opinion below is drawn from one short clause in § 3 of the Act of June 15, 1880. That clause, following a reference to the lands first to be allotted to individual members of petitioner bands, provides that "all lands not so allotted, the title to which is * * * [hereby] released and conveyed to the United States" shall be held for sale as public lands, for petitioners' benefit. Finding 12, R. 21. This language is seized upon as demonstrating that the United States was looking only to those lands to which the Indians could prove an indisputable title—that is, that the lands, instead of being "released" (*i. e.*, quitclaimed) to the United States as the agreement purported to do, were instead conveyed by the Indians upon warranty of good title—so that if the trustee could thereafter prove some anterior title of its own to any part of

the lands, it could take the lands to its own use and benefit free from the trust restrictions. Such a theory gives the United States credit for a prescience which could not exist, having in mind that prior to 1942 it was assumed by this Court that any Executive order creating an Indian reservation conveyed title to the Indians (see point 3 below). It is inconceivable that the language was inserted by the government from a nice appreciation of its rights in the land,[2] or that this phrase could have been included as a springe. Rather, it is obvious that the total purpose of the United States was to free this land from the Indian use and occupancy for the sake of making it available for the productive uses of the whites. To that end, the United States was willing to see the Indians paid a nominal sum and in addition whatever sums the lands they occupied might bring. These Executive-order lands were part of the "present reservation" which the Indians possessed and which the United States was acquiring; part of what the Indians "released" and conveyed to the United States in trust.

3. The Court of Claims has misapplied the opinion of this Court in *Sioux Tribe* v. *United States*, 316 U. S. 317. In that case (in which the earlier authorities are adequately reviewed), four Executive orders were adopted setting apart large tracts of land adjacent to the Great Sioux Reservation established by treaty with the Sioux, which tracts were used by liquor peddlers as a base of operations, as an addition to the present reservation of the Sioux. The purpose of these orders was to render the adjacent land "Indian country" in order to make possible the control of the liquor

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[2] As a matter of fact, in the court below, respondent itself urged the legislative history of the Act of June 15, 1880, to show that the Executive order of 1875 "was at no time mentioned, let alone considered by Congress, although there was discussion of items and matters of far less consequence than the acreage covered by the Executive order." C. Cls. Docket No. 45783, Defendant's Brf., pp. 52-53.

traffic with the Sioux. And after the Indian Liquor Law was extended to make sales of liquor to Indians a crime anywhere, let alone in the Indian country, the tracts were, by Executive order, restored to the public domain. 316 U. S. at p. 322-323. Furthermore, the Indians in that case did not understand that they had acquired any interest in the lands; and by an agreement in 1876, they relinquished and ceded to the United States all their lands (including the Executive-order areas) except a portion of the Great Sioux Reservation therein described. *Id.*, pp. 323-324. The Court held (p. 326) that where lands have been reserved for an Indian tribe by treaty or statute, the tribe must be compensated if the lands are subsequently taken from them; but the executive's power to convey any interest in public lands must be traced to Congressional delegation of its authority, which could not be done in that case.

In the instant case, the acquisition of tribal title to the lands embraced in the Executive order of November 22, 1875, is directly traceable to the authority and action of Congress. Not alone did the Executive order in settling a controversy with the Indians merely carry out the intent of the parties in the Treaty of 1868, but the Executive order addition was ratified by the action of Congress. The parties entered into a formal agreement—the Agreement of 1880—whereby petitioners ceded all the lands in their "present" reservation in Colorado.

The case, then, comes squarely within the ruling of this Court in the *Sioux* case, above (316 U. S. at p. 326) that—

> "• • • where lands have been reserved for the use and occupation of an Indian Tribe by the terms of a treaty or statute, the tribe must be compensated if the lands are subsequently taken from them. *Shoshone Tribe* v. *United States*, 299 U. S. 476; *United States* v. *Shoshone Tribe*, 304 U. S. 111; *United States* v. *Klamath Indians*, 304 U. S. 119."

Moreover, until the decision of this Court in the *Sioux* case in 1942, it had generally been understood and accepted that the titles of Indian tribes under all Executive-order reservations established for their benefit were unassailable. While the previous cases had not involved suits by the Indians against the United States, the language of all the cases indicated no restriction upon the effectiveness of the Executive orders which purported to vest the Indians with the use and benefit of the lands involved. *Spalding* v. *Chandler*, 160 U. S. 394, 402-403; *Re Wilson*, 140 U. S. 575, 577; *United States* v. *Mid-West Oil Co.*, 236 U. S. 459; cf. *Mason* v. *United States*, 260 U. S. 545. It is therefore difficult, in the light of the legal situation which obtained in 1880, to see how the Court of Claims could construe the action of Congress as one "plainly stating" that Congress considered petitioners did not own these Executive-order lands.

The *Sioux* case was decided on the basis of facts showing that the Executive order was merely one of convenience for suppression of liquor traffic and in no other sense for the benefit of the Indians. In the present case the order was intended to vest the Indians with actual use and occupancy of land on which it was understood they resided and which certainly they claimed to own under their earlier treaty with the United States; and it was in their possession until the agreement on which this suit is brought.

4. This suit involves the important question of the good faith of the United States—it having been found that the Indians (who certainly in 1880 could not have even anticipated the decision of this Court in the inapplicable *Sioux* case as to the validity of their Executive-order reservation) reasonably understood that they owned the land, and the United States having undertaken to act as trustee for the sale of the land—whether the United States ought not as

trustee be compelled to account for having unilaterally declared itself owner of the land in 1882. This question of good faith in the Indian affairs of the United States warrants grant of the petition for certiorari. *Creek Nation* v. *United States*, 318 U. S. 629, 631; *Choctaw Nation of Indians* v. *United States*, 318 U. S. 423, 424; *United States* v. *Santa Fe Pac. R. Co.*, 314 U. S. 339, 344.

Conclusion

The petition should be granted.

ERNEST L. WILKINSON,
JOHN W. CRAGUN,
FRANCIS M. GOODWIN,
Counsel for Petitioners.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 141

THE CONFEDERATED BANDS OF UTE INDIANS,
Petitioners,

vs.

THE UNITED STATES

REPLY TO BRIEF IN OPPOSITION

ERNEST L. WILKINSON,
JOHN W. CRAGUN,
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Counsel for Petitioners.

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1: Respondent attempts to dismiss in one curt paragraph (Brf. in Opp., page 16) the holdings of this Court that treaties and agreements with Indian tribes are to be construed as the *Indians understood them* (Petn., pages 11-12). Respondent purports to misunderstand the doctrine and attempts to fuse it with the rule that "doubts must be resolved in favor of the Indians." Actually these two rules of interpretation are very different. Liberal construction, to which respondent refers, is a rule which applies to treaties generally—not merely treaties with Indian tribes. *Nielsen* v. *Johnson*, 279 U. S. 47, 52; *Hauenstein* v. *Lynham*, 100 U. S. 483, 487; *Factor* v. *Laubenheimer*, 290 U. S. 276, 293-4; *Asakuru* v. *City of Seattle*, 265 U. S. 332, 342. But petitioner does not point to mere liberal construction as establishing the conflict of the opinion below with the opinions of this Court cited in the petition.

There is the flat conflict, completely overlooked in the brief in opposition, between the opinion below and the opinions of this Court with respect to the other rule that the understanding of the Indians must prevail. (Petn., pages 10-12.)

There is excellent reason for this rule, since in negotiations between the United States and an Indian tribe at the time these treaties or agreements were negotiated, the United States had it completely within its power to make its own intention clear. The Indians, who signed by mark (Treaty of March 2, 1868, 15 Stat. 619, 2 Kappler 990; agreement ratified by Act of June 15, 1880, 21 Stat. 199, 1 Kappler 180) were not masters of the language in which the treaty was written, and could not conceivably have understood respondent's technical exposition of the meaning of "title" in Section 3 of the Act of 1880, even if they had understood the language. In this respect the case is exactly like that of *Jones* v. *Meehan*, 175 U. S. 1, 10-12, wherein it was said:

> "In construing any treaty between the United States and an Indian tribe, it must always (as was pointed out by the counsel for the appellees) be borne in mind that the negotiations for the treaty are conducted, on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters of a written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by an interpreter employed by themselves; that the treaty is drawn up by them and in their own language; that the Indians, on the other hand, are a weak and dependent people, who have no written language and are wholly unfamiliar with all the forms of legal expression, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States; and that the treaty must therefore be construed, not according

to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians. *Worcester* v. *Georgia*, 6 Pet. 515; *The Kansas Indians*, 5 Wall. 737, 760; *Choctaw Nation* v. *United States*, 119 U. S. 1, 27, 28. In the case of *Worcester* v. *Georgia*, (1832) Chief Justice Marshall, speaking of article 4 of treaty of Hopewell of November 28, 1785, between the United States and the Cherokee Indians, which defined 'the boundary allotted to the Cherokees for their hunting grounds, between the said Indians and the citizens of the United States,' (7 Stat. 19,) said: 'There is the more reason for supposing that the Cherokee chiefs were not very critical judges of the language, from the fact that every one makes his mark; no chief was capable of signing his name. It is probable the treaty was interpreted to them.' "Is it reasonable to suppose that the Indians, who could not write, and most probably could not read, who certainly were not critical judges of our language, should distinguish the word "allotted" from the words "marked out?" 6 Pet. 551, 552. And Mr. Justice McLean, concurring, said 'The language used in treaties with the Indians should never be construed to their prejudice. 'To contend that the word "allotted," in reference to the lands guaranteed to the Indians in certain treaties indicates a favor conferred, rather than a right acknowledged, would, it would seem to me, do justice to the understanding of the parties. How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction.' 6 Pet. 582."

The decision of the court below departs completely from the above decision of this Court.

2. Respondent argues that the Act of 1880 was concerned with the apprehension of parties guilty of the so-called Meeker Massacre, rather than the cession of land in Colorado. As can be shown on the merits of this case,

the Meeker Massacre was occasioned by incitements in no way chargeable to the Indians, and under circumstances which made the acts complained of substantially justifiable warfare. That "massacre" merely provided an excuse for the removal of the Utes from Colorado—a consummation which the white people then infringing upon the Ute reservation devoutly wished. Contrary to respondent's statement that "the United States was not committed in the agreement itself to compensate the Indians for said lands sold" the only agreement which was ever reached was the agreement in Section 3 of the Act of June 15, 1880, to sell the ceded lands under the public land laws and hold the proceeds in trust for the petitioners. The preliminary "agreement," to which respondent apparently refers, and which was set out as a preamble to the act of 1880, was merely an undertaking by the chiefs then in Washington to "use their best endeavors" with their people to procure their consent to cede to the United States all of the territory of the present Ute reservation in Colorado. The agreement proposed by Congress and incorporated in Section 3 of the Act of 1880 was, after passage by Congress, ratified by the Confederated Bands of Ute Indians, petitioners; and it is the only agreement which the tribe *qua* tribe entered into. Finding 12, R. 20-22.

Petitioners believed that the reservation under the Treaty of 1868 encompassed lands considerably to the north of those included in the Executive-order addition to their reservation. Finding 6, R. 13-14. There is, therefore, considerable reason for saying that the Treaty of 1868 itself conveyed these lands to petitioners, their understanding of the unmarked imaginary line described in that treaty being that it was considerably to the north of even the north line of the Executive-order addition. Irrespective of this, however, when the understanding of the Indians

is established that their "present reservation" in 1880, which they thought they were ceding in trust, included the present lands, as the court below found, that understanding must prevail.

It is ratified by Act of Congress and the formal assent of petitioners. It is not a claim based upon a mere transitory Executive-order addition to an Indian reservation for temporary convenience such as that which confronted this Court in *Sioux Tribe* v. *United States*, 316 U. S. 317.

Conclusion

The petition should be granted.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 141

THE CONFEDERATED BANDS OF UTE INDIANS,
Petitioners,

vs.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR PETITIONERS

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BRIEF FOR PETITIONERS

Opinions Below

The opinions of the Court of Claims (R. 24-38) are reported in 64 F. Supp. 569.

Jurisdiction

The judgment of the Court of Claims was entered March 4, 1946 (R. 38). This Court granted the writ of certiorari on October 14, 1946 (R. 38). The jurisdiction of this Court is invoked under § 3(b) of the Act of February 13, 1925, c. 229, 43 Stat. 936, 28 U. S. C. § 288, as amended by the Act of May 22, 1939, c. 140, 53 Stat. 752.

The special jurisdictional act under which this case was instituted in the court below was the Act of June 28, 1938, c. 776, 52 Stat. 1209 (R. 5), as amended by the Acts of July 15, 1941, c. 299, 55 Stat. 593 (R. 10), June 22, 1943, c. 135, 57 Stat. 160. It was again amended by Act of June 11, 1946, c. 378, 60 Stat. —. The jurisdictional act contains no special provision for review on appeal to this Court. The provision of the Act of February 13, 1925, above, governing this Court's review of cases in the Court of Claims (28 U. S. C. § 288), under which this Court is authorized to review "*any case* in the Court of Claims", confers jurisdiction on this Court to review this case. *United States* v. *Esnault-Pelterie*, 299 U. S. 201, 202-203, and notes 3 and 4; *Shoshone Indians* v. *United States*, 324 U. S. 335, 337.

Questions Presented

1. A tribe of Indians ceded their reservation to the United States as trustee, the lands to be sold for their benefit. To the knowledge of the United States, the Indians understood the cession in trust as encompassing lands which at the time of the cession were a part of their reservation pursuant to an Executive order which had been proclaimed to settle a dispute between the Indians and the United States as to the territory reserved to the Indians by an earlier treaty with the United States. Is the United States liable for taking the Executive-order lands to its own use and profit, instead of selling them for the benefit of the Indians under the agreement?

Where a tribe of Indians reasonably understands its agreement with the United States in one way, and the United States understands it differently, which understanding shall prevail?

2. Whether the Act of June 15, 1880, constituting an agreement between petitioners and respondent, has been properly construed.

3. Whether *Sioux Tribe* v. *United States*, 316 U. S. 317, permits the United States to take without compensation lands added to their reservation by an Executive order in settlement of a boundary dispute where the Indians held the Executive order lands as a part of their entire reservation and made a formal cession of all their lands in trust to the United States for their own account.

Treaties, Agreements, Executive Orders and Statutes Involved

The material portions of treaties, agreements, Executive orders and statutes involved are quoted by the court below (R. 11-27) and in the statement, *post*.

Statement

Summary Statement.—This is a suit to recover for the taking of lands belonging to petitioners. In 1868 the parties entered into a treaty by which petitioners, after ceding a large area of their land, reserved certain areas in western Colorado for their own use. The northern boundary line of the land thus reserved was not located by any survey until 1875. This survey disclosed what both parties believed to be a mistake as to the location of that boundary, both parties having understood it to lie farther north. To eliminate the serious dissatisfaction of the Indians and settle the matter, the President, in 1875, promulgated an Executive order, adding to the northern end of the existing reservation a strip of land about nine miles wide. Later when whites threatened to move onto this strip under claim that the survey was erroneous, the Indians were assured it was validly a part of their reservation. In 1880, by agreement ratified by Congress and by petitioners, it was agreed petitioners would give up their "present reservation" (which included the strip of land added by the Executive order), in return for which the United States agreed, among other things, to

sell the lands to which the United States thereby acquired title, reimburse itself for expenses and advances, and pay the balance of the proceeds to petitioners. Petitioner Indians understood that this sale included all the lands of their reservation, including the lands which some four or five years previously had been added by the Executive order of 1875. Nevertheless, respondent by an Executive order of August 4, 1882, restored this strip of land to the public domain, and instead of accounting to petitioners for the proceeds of sale, has retained such proceeds for its own account, treating itself as the proprietor of the lands and without regard to its trusteeship for petitioners under its Agreement of 1880.

The Court of Claims held (R. 27-28) that petitioners did not have technical title to the lands added by the Executive order and that respondent did not therefore undertake to sell such lands for the account and benefit of petitioners.

Detailed Statement.—By Treaty of March 2, 1868, 15 Stat. 619, 2 Kappler 990, petitioners ceded (Art. III) all claim to their lands in the United States in exchange for the reservation for their benefit (Art. II) in Colorado, of a part of their original country. This reservation was bounded on the east by the 107th meridian, on the south and west by the southern and western boundaries of Colorado, and on the north by a line 15 miles north of the 40th parallel of north latitude. Finding 3, R. 12. As contrasted with their original country, which they had to protect themselves, the United States "solemnly agreed" to protect them in the "absolute and undisturbed use and occupation" of their new reservation, and warranted that "no persons • • • except • • • officers, agents and employees of the Government • • • shall ever be permitted to pass over, settle upon, or reside" thereon. (Art. 1.). The United States also (Art. IV) agreed to establish two agencies

"on the reservation," one of which, material in the present case, was to be on White River. Finding 5, R. 13.

The White River Agency was established during the latter part of 1869 at a place considered favorable for agency purposes, which was thought by the government and Indians alike to be south of the northern boundary line. Finding 5, R. 13.

The Indians believed that their reservation encompassed lands considerably to the north of the agency; for they ordered miners on Douglass Creek [Wyoming], fifty miles north of the reservation, off their lands and complained of a proposed wagon road in the Bear [now Yampa] River Valley in northern Colorado on their understanding that the valley was in their country. The agent at the White River Agency persistently requested a survey of the northern boundary in order to set the matter at rest. He reported that if he had "talked a minute" he had talked "a hundred hours" on the subject but could get no concession from them that the country above referred to did not belong to them. Finding 6, R. 15.

The uncertain location of the northern boundary line provided for by the Treaty of 1868 is further revealed by the fact, reported by Commissioner Manypenny (*Our Indian Wards* [1880], p. 401) that petitioners, at the time of the location of the northern agency on the White River, wanted it located on the Bear (now Yampa) River. And Governor Edward M. Cook of Colorado, ex-officio Superintendent of Indian Affairs, as late as September 1, 1870, reported (Report, Commr. Ind. Affairs, 1870, quoted in the Report of the Secty. Interior, 1870-71, p. 632, 633-634) that, after visiting the White River Agency, "My impression is that the proper location for this agency would have been on the south bank of Bear River, about 80 miles north of its present site", and that "The Indians themselves desired the agency established at the point • • •". When

surveys were ultimately made, the Bear River turned out to be north of the northern boundary of petitioners' reservation.

In October or November of 1875—more than seven years after the treaty—the northern bounadry was eventually surveyed. The survey established the north boundary of the reservation to be apparently at a location south of where defendant's agents had thought, and far south of where the Indians had thought the line ran. Finding 7, R. 16-17. Upon information of these facts being communicated to Washington, the Commissioner of Indian Affairs (Finding 8, R. 19) and the Secretary of the Interior (Finding 9, R. 19) recommended the adoption of an Executive order adding a strip of land [about nine miles in width] to the northern end of petitioners' reservation. The Executive order was promulgated by the President on November 22, 1875 (1 Kappler 834). By it this strip was "set apart for the use of the several tribes of Ute Indians, as an addition to their present reservation" in Colorado. Finding 10, R. 19-20.

The agent at White River in being informed of the Executive order, was assured that it "fully protects your Indians in the peaceable possession of their improvements in the White River Valley and the Agency buildings," and would enable him to "assure the Indians of the exact location of the limits of their reservation as enlarged." Finding 11, R. 20. Accordingly, after petitioners were advised of the adoption of the Executive order in 1875, it was understood by them, just as it was understood by respondent, that the lands added by the Executive order and which both parties had understood were meant to be encompassed by the reservation in the 1868 Treaty (Finding 7, R. 16-17), were part of petitioners' reservation.

Two years later, in 1877, when the accuracy of the 1875 survey was questioned and white persons were threatening to settle and prospect for gold on the land located north

of the 1875 survey, the Indian Agent wrote Washington as to whether he would be supported if he removed persons coming on the reserve. S. Exec. Doc. No. 29, 46th Cong., 2d Sess., p. 41. In response thereto he was advised that the right of the Indians to exclusive possession of their reservation, as enlarged by the Executive order, was not affected by the accuracy of the 1875 survey; that the question of the Indians' right to exclusively occupy this land was "settled" by the Executive order of 1875; "that any person settling upon lands in Colorado south" of the northern boundary of the Executive order strip "is there in violation of law, and subject to removal under Sections 2147 to 2151 [Title 25 U. S. C., §§ 220-224], both inclusive, of the Revised Statutes". *Id.*, p. 42. The sections of the Revised Statutes referred to provide criminal penalties for trespass on Indian reservations and authorize the use of military authority to remove persons from these reservations.

Later that same year the Indian Agent reported that whites were depriving the Indians of their lands, and that "From what I see of the disposition and wishes of the white people in the neighborhood of the northern portion of the reservation, they would gladly deprive the Utes of this country . . . ." He reported different colonization plans to settle on the Ute reservation, S. Exec. Doc. No. 29, 46th Cong., 2d Sess., p. 43. In response thereto, the Commissioner of Indian Affairs recommended to the Secretary of Interior that "the General Land Office be directed to instruct the register and receiver of the proper district to give public notice that all lands withdrawn by said Executive order are reserved as Indian lands, and are not, therefore, regarded as a part of the public domain for any purpose whatever, and that white settlers thereon are trespassers, and will be removed by the governmnt, with the aid of the military, if necessary." *Id.*, p. 44. He recommended that "a military force be sent to the White River Valley.

to insure the faithful observance of the treaty stipulations with the Utes, by removing and keeping away from their reservation all unauthorized persons." *Id.*, p. 44-45.

The pressure of those on the frontier to seize the Ute lands, guaranteed, as hereinbefore stated by the Treaty of 1868 and the Executive order of 1875, was gradually intensified. In September of 1879, there occurred what the Indians understood to be undeclared warfare upon them by respondent, leading to the Meeker Massacre in the northern part of the Reservation, in which the Indian Agent and all the agency's male employees and others were killed by certain White River Utes (R. 25). (See discussion in the argument, *post.*)

To prevent further warfare and to initiate a transfer of the Ute lands in Colorado to respondent [1] the Chiefs and headmen of the Tribe were summoned to Washington, where, on March 6, 1880, they entered into an agreement with respondent whereby they promised "to use their best endeavors with their people to procure their consent to cede to the United States *all of the territory of the present Ute Reservation* in Colorado" after first providing for individual allotments to the members of petitioner bands (21 Stat. 200). Congress thereupon passed an act (Act of June 15, 1880, c. 223, 21 Stat. 199, 1 Kappler 180) which (1) by its

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[1] Secretary of Interior Carl Schurz justified the agreement on the ground that it was the only alternative short of war with the Utes. In testifying before the House Committee on Indian Affairs he stated: (Report No. 1461, House of Representatives, 46th Cong. 2nd Sess. p. 2.)

> "A war in those mountains at that season, and I am stating this upon the authority of military officers with whom I conversed upon the subject, would have brought us a winter campaign likely to cost from ten to fifteen million dollars and a very considerable number of men and officers."

He further reported that while Senator Hill of Colorado thought the agreement with the chiefs and headmen would be satisfactory to his people, Senator Teller, also of Colorado, took the position that "it would not be satisfactory to him unless every Ute left Colorado" (*Id.*, p. 7).

preamble recited that the "chiefs and headmen" had "submitted to the Secretary of Interior an agreement for the sale to the United States of their *present reservation* in the State of Colorado", (2) incorporated as a part of its provisions the agreement of said "chiefs and headmen" to "use their best endeavors with their people to procure their consent *to cede* to the United States *all of the territory of the present Ute Reservation* in Colorado", and (3) after providing that certain allotments in severalty should be made to plaintiffs, specified by Section 3 that "*all the lands not so allotted,* the title to which is, by the said agreement of the confederated bands of the Ute Indians, and this acceptance by the United States, released and conveyed to the United States, shall be held and deemed to be public lands of the United States and subject to disposal under the laws providing for the disposal of the public lands," the proceeds of such sales, after the payment of certain expenses, to be used for the benefit of petitioners. This statutory scheme for the cession and sale of all of petitioners' "*present* reservation" was conditioned upon acceptance of the statutory terms by petitioners. Petitioners ratified the statute, which accordingly became an agreement between petitioners and respondent. Finding 12, R. 20-22.

Subsequently, the lands to be allotted to the individuals not having been selected, doubts existed whether settlers could make entry of the lands in the former reservation in Colorado. To remove these doubts, Congress declared by the Act of July 28, 1882, c. 357, 22 Stat. 178, 1 Kappler 205, that the lands formerly occupied by petitioner bands other than those set apart for the Southern Utes by the Agreement of 1880, were "public lands of the United States," subject to disposal in accordance with the agreement of 1880. Finding 13, R. 22. No sooner had this act been approved than the Commissioner of Indian Affairs (on August 2, 1882) recommended that the lands described in the Exec-

utive order of 1875, and which formed a part of the reservation as ceded under the 1880 agreement and were made "public lands of the United States" by the statute of 1882, be restored to the public domain. Finding 14, R. 22-23. Thereupon, the President, by Executive order of August 4, 1882, 1 Kappler 834, ordered that the land so set apart and so recognized by the Acts of Congress of June 15, 1880, 21 Stat. 199, and July 28, 1882, 22 Stat. 178, as part of petitioners' reservation, "be, and the same hereby is restored to the public domain." Finding 15, R. 23.

The United States has failed completely in its obligation to hold and sell these lands for the benefit of petitioners. It restored them to the public domain, and thereafter deposited the moneys from sales thereof to its own use and account in Treasury; and it has neither credited such moneys, nor accounted for them, to plaintiffs. Finding 16, R. 23.[2]

This suit was instituted pursuant to a special jurisdictional act approved June 28, 1938, c. 776, 52 Stat. 1209, as amended by the Acts of July 15, 1941, c. 299, 55 Stat. 593, and June 22, 1943, c. 135, 57 Stat. 160. This act authorized a suit or suits in the court below by the Ute Indians or any tribe or band thereof on all legal and equitable claims of whatsoever nature—

> "including, but without limiting the generality of the foregoing, claims arising under or growing out of any treaty or agreement of the United States, law of Congress, Executive order, or by reason of any lands taken from them, without compensation, or for the fail-

[2] Previously, under a jurisdictional act of March 3, 1909, c. 263, 35 Stat. 781, 788-789, petitioners brought suit against the United States for sales of the ceded lands pursuant to the Agreement of 1880 up to that time; and they ultimately recovered a judgment for the proceeds of cash sales and land reserved for public uses, less offsets and deductions up to July 1, 1910. This recovery did not, however, include the sale of lands added to the reservation by the Executive order of November 22, 1875, with which this case is concerned. Finding 17, R. 23-24.

> ure or refusal of the United States to protect the interest of any of said bands in lands (as to which any of said bands had the possessory right of use and occupancy), or because of any mismanagement or wrongful handling of any of the funds, land, property, or business enterprises belonging to or held in trust for any of said bands by the United States, or any misfeasance or nonfeasance on the part of the United States with respect thereto, or otherwise."

By § 3 of this jurisdictional act, it is provided that at the trial of any suit instituted thereunder, the court shall apply as respects the United States "the same principles of law as would be applied to an ordinary fiduciary"; and that "in the determination of the validity of any claim asserted or defense interposed hereunder, the Court shall have the full power and authority of a court of equity".

By § 6, it was provided:

> "If the court shall find that any lands formerly belonging to the said bands of Ute Indians or any of them, have been taken by the United States without compensation therefor and set apart and reserved as national reservations or for other public uses or otherwise classified, reserved, or withdrawn from entry and sale under the public land laws or disposed of in any manner whereby the said Indians have been deprived of the use or benefits of such lands and the natural resources thereof, it is hereby declared that such action shall be sufficient grounds for equitable relief and the court shall render judgment in favor of said Indians, and shall award to them, as for a taking under the power of eminent domain, compensation for all such lands and natural resources * * *."

The Court of Claims dismissed the petition (R. 24). It correctly stated that the question presented was whether there was included in the 1880 agreement, for sale by respondent for petitioners' benefit, the lands which had been

added to the reservation by the 1875 Executive order. But it nevertheless held that while "when these chiefs and headmen entered into the agreement ratified by the Act of June 15, 1880, they no doubt believed that they were ceding to the United States these lands as well as others" (R. 26), still, the United States undertook to sell only "all the lands not * * * allotted [to the Indians], the title to which is, by the said agreement of the confederated bands of the Ute Indians, and this acceptance by the United States, released and conveyed to the United States * * *." It therefore regarded as the controlling issue whether the Indians had strict title to the lands by virtue of the Executive order. It thought it plain (although it found no evidence beyond the terms of the agreement of 1880 itself on which to base its conclusion) that Congress was "careful to limit its agreement to sell for the Indians' account those lands to which the Indians had title" and that Congress did not mean to ratify and confirm the President's action in setting apart these lands as an addition to the 1868 reservation (R. 28). It thought the action of the Commissioner of Indian Affairs and the Secretary of the Interior in recommending the Executive order of 1882 by which the lands were taken from petitioners (of which complaint is here made) to be administrative construction showing respondent's ownership of the land (R. 27-29).

Judge Littleton concurred in a separate opinion. R. 28.

Specification of Errors to Be Urged

The court erred:

1. In holding that the Executive order of November 22, 1875, did not recognize and settle between petitioners and respondent the title of petitioners reserved in their lands in Colorado under the Treaty of March 2, 1868.

2. In holding that petitioners did not acquire title to the lands described in the Executive order of November 22, 1875, either by the terms of that order or under the Treaty of March 2, 1868.

3. In holding that under the agreement ratified by Congress by Act of June 15, 1880, the United States did not undertake and agree to hold the lands described in the Executive order of 1875 for sale for petitioners' benefit.

4. In holding that by the Act of June 15, 1880, ratified by petitioners, the Executive order of 1875 was not ratified and confirmed as having vested petitioners with title to the lands therein described.

5. In failing to hold that petitioners are entitled to recover.

Summary of Argument

1. In the agreement between petitioners and respondent in 1880, petitioner Indians understood they owned and were ceding to the United States in trust for their own benefit the lands added to their reservation by Executive order of 1875. Respondent knew of this understanding of petitioners. Even were it true that respondent had a contrary undisclosed understanding of the agreement, this Court's decisions require that the understanding of the Indians must prevail. Were any other rule applied to the case at bar, it would sanction a fraud upon petitioners, who are wards of respondent. Respondent had exclusive control of the drafting of the agreement, and doubts must, therefore, be resolved against respondent. Respondent may not profit at its wards' expense from its own silence, where it knew of petitioners' understanding.

2. But it is not true that the parties could have had contrary understandings; the agreement is susceptible only

of the interpretation which petitioners placed upon it at the time. The court below in interpreting § 3 of the Act of 1880 (the agreement), which provided that "all the lands not • • • [individually] allotted, the title to which is by this agreement • • • released and conveyed to the United States" should be sold and the proceeds held in trust for petitioners, isolated the word "title" and gave it an unwarranted technical interpretation. Based on that narrow interpretation the court concluded that an Executive order could not have established a title in petitioners which could be released and conveyed to respondent. The fact is that that phrase was merely a convenient means for the draftsman to use in referring to the net lands conveyed. Contemporary maps showed that the Ute Reservation at that time included, without differentiation from the rest of Plaintiffs' reservation, the lands added by the Executive order. The law of the day indicated that the title of the Indians was not different, whether the lands were held under treaty, agreement, or Executive order. And there is no basis for supposition that the United States felt the petitioners were not conveying these lands as well as others.

Sioux Tribe v. *United States*, 316 U. S. 317, is not authority to the contrary. In that case, there was no intent to settle any dispute with the Indians, vest any title in them, or serve any other purpose than a transitory law-enforcement function of the government. Here it was intended that the lands would be incorporated in and have the same status as the other land already encompassed within the treaty boundaries. Congress accepted this view of the Act of 1880; and the Act of 1882 (which preserved petitioners' rights in the proceeds of the lands under the 1880 Agreement) was deemed necessary to open these lands to entry and sale.

Nor is it true that the "Meeker Massacre" in 1879 had resulted in such vindictive or vengeful attitude on the part

of Congress that it could not have meant for petitioners to have the benefit of the sales of the Executive-order lands. Were that true, § 3 of the Act of 1880 would never have been agreed to by respondent with respect to any of the lands; and the incident can only confirm that Congress intended to acquire the Executive order as well as other lands. Furthermore, the Meeker Massacre itself was (and was so recognized by many at the time) an act of justifiable warfare on the part of petitioners, following the unexplained march of their settlements by the United States Army in violation of the treaty with petitioners.

Argument

1. At the time the agreement of 1880 was entered into, the Indians understood that they owned the lands which were described in the Executive order of 1875.[3] In the

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[3] Article II of the Treaty of 1868 had reserved to petitioners that part of their former lands which was described as bounded on the east by the 107th meridian, on the south and west by the southern and western boundaries of Colorado, and on the north by a line 15 miles north of the 40th parallel of north latitude. This survey jargon was of course unintelligible to the Indians, all of whom were illiterate and who could sign only by mark (Treaty of 1868, 15 Stat. 619, 623, 2 Kappler 990, 993), and who knew the location of their reserved country by natural landmarks rather than by the white man's technology. The matter of unsurveyed boundaries had plagued Indians and the Executive alike from the time of the 1868 Treaty. Thus, Commissioner Manypenny (*Our Indian Wards* [1880], final chapter) relates that when the survey of the east boundary of the reservation (the 107° of west longitude) was made, it fell farther west than the line pointed out to the Indians when the treaty was made, notwithstanding which the reservation in western Colorado as it was excited the cupidity of white settlers and prospectors. This led ultimately to the purchase from petitioners by respondent in 1873 of a large tract in the principal mining region, through the Brunot Agreement ratified by Act of April 29, 1874, c. 136, 18 Stat. 36, 1 Kappler 151. It was in the transactions of Mr. Brunot, as Commissioner for the United States, that Mr. Brunot stated to petitioners that if there were mines in the area, the United States could not stop the Americans from going on the Ute lands—which inspired the famous remark of Chief Ouray, "Why can not you

words of the Court of Claims (R. 26) the Indians "in all probability believed that they were as much a part of their reservation as were the lands set aside by the Treaty of March 2, 1868." And they understood that these lands, as well as the other lands in their reservation, were a part of the lands they were ceding to the United States in trust, to be sold for their benefit.[4] In the words of the Court of Claims (R. 26), "they no doubt believed that they were ceding to the United States these lands as well as others". Not only that, but the United States knew the understanding of the Indians; it was acquainted with their

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stop them; *is not the Government strong enough to keep its agreements with us?*" (Italics added.)

And yet the northern boundary remained unsurveyed until two years after that. Petitioners believed that the land which they had kept extended as far north as Douglass Creek in Wyoming, which was 50 miles north of the reservation line, and also included the Bear River Valley, which was substantially north of the northern boundary as described in the treaty. Finding 6, R. 13-15. And when the 1875 survey showed their northern boundary to be apparently even south of the agency buildings, consternation set in. They knew that to settle this dispute and to appease them, the President—their Great White Father—had confirmed by Executive order their ownership of some of the lands they already understood they owned. Presumably the Indian Agent, pursuant to instructions, had assured them of "the exact location of the limits of their reservation as enlarged." Finding 11, R. 20. They undoubtedly knew that their agent had been informed that whites had no more right to enter or settle on the Executive order land than on their other land. When, therefore, some of their chiefs and headmen agreed, by the preliminary agreement of 1880 to "use their best endeavors with their people to procure their consent to cede * * * all the territory of the *present Ute Reservation*", petitioners believed, as admitted by the court below (R. 26), "that they [the Executive order lands] were as much a part of their reservation as were the lands set aside by the treaty of March 2, 1868."

[4] The chiefs and headmen agreed to attempt to persuade their people "to cede * * * all of * * * the present Ute Reservation." R. 26. The only thing reserved to petitioners was the right to individual allotments. Since no reservation was made of the executive order lands "they no doubt believed" as again admitted by the Court of Claims "that they were ceding to the United States these lands as well as the others" (R. 26). They were concerned with the realities of the moment—in which it made no difference whether their possession of this part of their

intent. The court below acknowledged (R. 28), "Congress knew they [petitioners] probably considered these Executive Order lands a part of their 'present reservation' "—the term "present reservation" being the language used in the preliminary agreement of some of the chiefs and headmen of petitioners, signed March 6, 1880, and set forth in the act of June 15, 1880, which act itself became the agreement between the parties upon ratification by petitioners.

In this situation—where the Indians understood both that they owned these Executive-order lands and that by the agreement of 1880 they were ceding them to the United States in trust, and this understanding was known to respondent—the opinions of this Court require that the understanding of the Indians will prevail—even assuming (which is not admitted) that respondent had a contrary undisclosed understanding. This Court has held flatly that a "treaty must • • • be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians." *Jones* v. *Meehan*, 175 U. S. 1, 11-12; *Choate* v. *Trapp*, 224 U. S. 665, 675; *Starr* v. *Long Jim*, 227 U. S. 613, 622-623; *Marlin* v. *Lewallen*, 276 U. S. 58, 64. "How

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original country was recognized by respondent by treaty or by Executive order—and knew of no difference in qualities of ownership and certainly had no power to divine that some 62 years later a court would draw some esoteric distinction between the quality of ownership in that part of their land described in the treaty and that part described in the Executive order. (See *Sioux Tribe of Indians* v. *United States*, 316 U. S. 317.) Even if they had consulted the legal authorities of the time, which in their ignorance they could not, they would probably have been informed, as this Court soon thereafter held, that "When Indian reservations were created, either by treaty or Executive order, the Indians held the land by the same character of *title*, to wit, the right to possess and occupy the lands for the uses and purposes designated." (Italics added.) *Spaulding* v. *Chandler*, 160 U. S. 394, 403; see also *Ex parte Wilson*, 140 U. S. 575, 577. And see discussion, *post*.

the words of the treaty were understood by this unlettered people, * * * should form the rule of construction." *Worcester* v. *Georgia*, 6 Pet. 515, 582; *Choctaw Nation* v. *United States*, 119 U. S. 1, 27, 28. "And we have said that we will construe a treaty with the Indians as 'that unlettered people' understood it, * * *." *United States* v. *Winans*, 198 U. S. 371, 380. *Northern P. R. Co.* v. *United States*, 227 U. S. 355, 366-367; *Seufert Bros.* v. *United States*, 249 U. S. 194, 198. Treaties "are to be construed in the sense in which naturally the Indians would understand them." *United States* v. *Shoshone Tribe*, 304 U. S. 111, 116. "It is our responsibility to see that the terms of the treaty are carried out, so far as possible, in accordance with the meaning they were understood to have by the tribal representatives * * *." *Tulee* v. *Washington*, 315 U. S. 681, 684-685. This doctrine of construction applies to agreements made with the Indians since March 3, 1871, under R. S. § 2079 (25 U. S. C. § 71), equally with treaties made prior to that date. *Marlin* v. *Lewallen*, 276 U. S. 58, 64.

The theory of the court below is based upon the view that the United States had the understanding (contrary to that of petitioners) that the lands in question were not to be held for sale in trust. This is inferred from a very critical interpretation of the word "title" in § 3 of the Act of 1880.[5]

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[5] Section 3 of the Act of 1880 (R. 21) provided that lands for settlement of the Indians in severalty should be surveyed; an allotment should be made to each of the Indians; and a patent should be issued, and then provided (italics added)—

"* * * all the lands not so allotted, *the title to which is*, by the said agreement of the confederated bands of the Ute Indians, and this acceptance by the United States, *released and conveyed to the United States*, shall be held and deemed to be public lands of the United States and subject to disposal under the laws providing for

The Court of Claims reasoned (R. 27) that under this section, it will

> "* * * be seen that the United States agreed to sell for the account of the Indians only those unallotted lands 'the title to which is, by the said agreement of the confederated bands of the Ute Indians, and this acceptance by the United States, released and conveyed to the United States'. This did not include the lands added to the reservation by Executive Order because the Indians did not have title to these lands and, hence, title to them was not conveyed by the agreement referred to."

As we point out below, it is difficult to see how even a white-man's court could distinguish between the estate which the Indians had in the Executive order lands and "title" as used in § 3 of the 1880 Agreement. *A fortiori* it cannot conceivably be supposed that Indians who signed by mark (Treaty of March 2, 1868, 15 Stat. 619, 623, 2 Kappler 990; preliminary agreement ratified by Act of June 15, 1880, 21 Stat. 199, 202, 1 Kappler 180) could be expected so to construe the word "title." Some 114 years ago this Court was urged to make a similar fine distinction between the technical words "allotted" and "marked out". But

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the disposal of the public lands, at the same price and on the same terms as other lands of like character, except as provided in this act: *Provided*, That none of said lands, whether mineral or otherwise, shall be liable to entry and settlement under the provisions of the homestead law; but shall be subject to cash entry only in accordance with existing law; and when sold the proceeds of said sale shall be first sacredly applied to reimbursing the United States for all sums paid out or set apart under this act by the government for the benefit of said Indians, and then to be applied in payment for the lands at one dollar and twenty-five cents per acre which may be ceded to them by the United States outside of their reservation, in pursuance of this agreement. And the remainder, if any, shall be deposited in the Treasury as now provided by law for the benefit of the said Indians, in the proportion hereinbefore stated, and the interest thereon shall be distributed annually to them in the same manner as the funds provided for in this act: * * *" (Italics added.)

this Court, through Chief Justice Marshall, refused to draw such distinction to the prejudice of the Indians, and instead ruled that the agreement must be construed as the Indians understood it. *Worcester* v. *Georgia,* 6 Pet. 515, 552, 582. The reasons for construing a treaty or agreement in this way were restated by the Court in *Jones* v. *Meehan,* 175 U. S. 1, 10-12, with reference to the earlier opinion in *Worcester* v. *Georgia,* as follows:

> "In construing any treaty between the United States and an Indian tribe, it must always (as was pointed out by the counsel for the appellees) be borne in mind that the negotiations for the treaty are conducted, on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters of a written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by an interpreter employed by themselves; that the treaty is drawn up by them and in their own language; that the Indians, on the other hand, are a weak and dependent people, who have no written language and are wholly unfamiliar with all the forms of legal expression, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States; and that the treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians. *Worcester* v. *Georgia,* 6 Pet. 515; *The Kansas Indians,* 5 Wall. 737, 760; *Choctaw Nation* v. *United States,* 119 U. S. 1, 27, 28. In the leading case of *Worcester* v. *Georgia* (1832), Chief Justice Marshall, speaking of article 4 of treaty of Hopewell of November 28, 1785, between the United States and the Cherokee Indians, which defined 'the boundary allotted to the Cherokees for their hunting grounds, between the said Indians and the citizens of the United States' (7 Stat. 19), said: 'There is the more reason for supposing that the Cherokee chiefs

were not very critical judges of the language; from the fact that everyone makes his mark; no chief was capable of signing his name. It is probable the treaty was interpreted to them.' 'Is it reasonable to suppose that the Indians, who could not write, and most probably could not read, who certainly were not critical judges of our language, should distinguish the word "allotted" from the words "marked out"?' 6 Pet. 551, 552. And Mr. Justice McLean, concurring, said: 'The language used in treaties with the Indians should never be construed to their prejudice.' 'To contend that the word "allotted," in reference to the lands guaranteed to the Indians in certain treaties indicates a favor conferred, rather than a right acknowledged, would, it would seem to me, do injustice to the understanding of the parties. How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction.' 6 Pet. 582."

Any other interpretation would work a fraud on the wards of the Government. Respondent had it clearly within its power to place the matter of the Executive order addition beyond controversy by including or excluding it specifically from the lands to be the subject of the trust. The court below acknowledges (R. 27) that "At the time Congress ratified this agreement, it must have known of the addition to the reservation by Executive Order * * *". In the absence of having plainly excluded it from the land to be sold for petitioners' account, it must be presumed that it is to be included; for respondent had exclusive control of the drafting of the agreement. *Jones* v. *Meehan, supra.* As Williston puts it, "Since one who speaks or writes, can by exactness of expression more easily prevent mistakes in meaning, than one with whom he is dealing, doubts arising from ambiguity of language are resolved in favor of the latter." WILLISTON, Contracts (rev. ed.), § 621, p. 1788. Or as the courts have put it, following Williston's expression

of the principle (*id.*, § 91B, p. 284), "one who keeps silent, knowing that his silence will be misinterpreted, should not be allowed to deny the natural interpretation of his conduct." *Laredo Nat. Bank* v. *Gordon* (C. C. A. 5th), 1932, 61 F. (2d) 906, 907; *Truscon Steel* v. *Cooke* (C. C. A. 10th), 1938, 98 F. (2d) 905, 911.

As a matter of fact, the conduct which the court below attributes to the respondent would amount to fraud, under the tests laid down in the Restatement. AM. L. INST., *Restatement of the Law of Contracts*, vol. 2, §§ 471, 472. That work establishes that unprivileged non-disclosure is fraud, and then rules (§ 472):

> "(1) There is no privilege of non-disclosure, by a party who
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> * * * * * * *
>
> "(b) knows that the other party is acting under a mistake as to undisclosed material facts, and the mistake if mutual would render voidable a transaction caused by relying thereon, or
>
> "(c) occupies such a relation to the other party as to justify the latter in expecting that his interests will be cared for, * * *.
>
> "(2) Where non-disclosure is not privileged it has the effect of a material misrepresentation."

Indeed, one of the illustrations given by the authors of the Restatement to illustrate the principles enunciated in Sec. 472 is strikingly like the case at bar:

> "1. A, in conversation with B, states that A's land Blackacre contains thirty acres. A supposes this statement to be true, and makes it with no expectation of selling the land. Subsequently A discovers that the land contains only twenty-three acres, and after acquiring this knowledge, and having in mind his previous conversation, contracts with B to sell him the land. A's

lack of disclosure is fraud, and it is immaterial that A shows B the boundaries of the land before the contract is made."

2. Leaving to one side the supposed conflict in understanding between the parties, it is not true that respondent understood that the agreement did not convey the Executive order lands. The agreement is not susceptible of the interpretation placed on it below. By the preliminary agreement of March 6, 1880, the "chiefs and headmen" agreed and promised "to use their best endeavors with their people to procure their consent *to cede to the United States all of the territory of the present Ute Reservation* in Colorado" with certain exceptions not here material. 21 Stat. 199, 200. At the time of such agreement the land here in question was a part "of the territory of the *present Ute Reservation* in Colorado", and surely embraced in the above language.

In the final agreement, the Act of June 15, 1880, c. 223, 21 Stat. 199, thereafter (pursuant to § 10, 21 Stat. at p. 205) ratified by petitioners, Congress incorporated the preliminary agreement as well as other provisions. Further, the preamble to said act, as in the case of the incorporated agreement, recited that "certain of the chiefs and headmen of the confederated bands of the Ute tribe of Indians, now present in the city of Washington, have agreed upon and submitted to the Secretary of Interior an agreement for the sale to the United States of *their present reservation in the State of Colorado* * * *." The land in question was then still a part of the Ute reservation and surely embraced in the above language.

The additional provisions of the act, instead of giving any indication of any Congressional intent to depart from this central purpose of the act—to acquire all of the land of the then "present Ute Reservation"—corroborate that

purpose. Thus Section 3 provided that after certain allotments in severalty should be made to plaintiffs

> "*all* the lands not so allotted, the title to which is, by the said agreement of the confederated bands of the Ute Indians, and this acceptance by the United States, released and conveyed to the United States, shall be held and deemed to be public lands of the United States and subject to disposal under the laws providing for the disposal of the public lands * * *." (Italics added.)

The proceeds from this land were to be applied (1) to reimburse the United States for all sums paid out or set apart under the act for the Utes; (2) to pay the United States for land allotted to the Utes outside of their reservation; and (3) to hold the remaining proceeds in trust for the Ute Indians.

In the light of the language of the original agreement, and the preamble to the statute, no significance is to be given to the use of the word "title" appearing in Section 3. It was merely a convenient means of referring to the land embraced within plaintiffs' reservation—phraseology which would be apt to come to the mind of any Anglo-Saxon draftsman. If it had been intended to except the land here in question, it was incumbent on Congress to so state. It did except other land and specifically so stated.[6] A specific exclusion of other land not intended to be ceded shows affirmative intent to include this land.

The court below however seizes upon the phrase "all the lands * * * title to which is, * * * released and conveyed to the United States", and applies it so as to override and supersede all the other provisions of the statute, and to spell out an intent on the part of Congress not to

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[6] The exceptions were "unoccupied agricultural lands on the La Plata River," "agricultural lands on Grand River," etc. (Sec. 1), for individual allotments. By Section 8, the "Uncompahgre Park" was also excepted.

include the Executive-order land. The reasoning of the court below is as follows:

> "The Indians proposed to cede their 'present reservation'; Congress knew they probably considered these Executive Order lands a part of their 'present reservation,' and so it was careful to limit its agreement to sell for the Indians' account those lands to which the Indians had title. It did not mean to ratify and confirm the President's action in setting apart these lands 'as an addition to their present reservation in said Territory,' and it plainly said so."

The 1880 agreement will be read in vain for anything "plainly" stating, or even intimating, that Congress did not mean to ratify the addition of the Executive-order lands. If, as the court concedes, Congress knew the Indians considered these lands to be a part of their reservation, it is not for the courts to impute to Congress, as guardian[7] of these Indians, an intent to cheat them out of these lands by using trick language which the Indians did not understand.

The understanding of persons dealing for respondent could not have been very different from the understanding of the Indians themselves, so far as is concerned the title to the Executive order lands. The Executive order lands

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[7] This Court has long referred to respondent as a "guardian" or "trustee in possession" on behalf of its Indian wards. (*Morrison* v. *Work*, 266 U. S. 481, 485); as one having "fiduciary duties" (*Seminole Nation* v. *United States*, 316 U. S. 286, 295); and as standing in a relationship of guardianship or trust, *The Cherokee Nation* v. *The State of Georgia*, 5 Pet. 1, 17; *United States* v. *Kagama*, 118 U. S. 375; *Choctaw Nation* v. *United States*, 119 U. S. 1; *Jones* v. *Meehan*, 175 U. S. 1, 10; *United States* v. *Pelican*, 232 U. S. 442, 447, 450-451; *United States* v. *Payne*, 264 U. S. 446, 448; *United States* v. *Creek Nation*, 295 U. S. 103, 110; *Tulee* v. *State of Washington*, 315 U. S. 681, 684-685; *Klamath Indians* v. *United States*, 296 U. S. 244, 254.

The Jurisdictional Act in this case (R. 6) specifically provides (§ 3) that at "the trial of any suit instituted hereunder the court shall apply as respects the United States the same principles of law as would be applied to an ordinary fiduciary."

were shown on contemporary maps as a part of the "Ute reservation." This will be found upon reference to any map showing Indian Reservations in the United States, such as the maps attached to the Reports of the Commissioner of Indian Affairs for 1879 and 1880. The map thus attached inside of the front cover of the Report of the Commissioner of Indian Affairs for 1879, as on the other maps, includes, without any differentiation from the rest of the reservation, the lands added by the Executive order. There was no decision anywhere which indicated that the lands were not valid Indian lands. And ten years later even this Court in *Spaulding* v. *Chandler*, 160 U. S. 394, 402-403, expressed the opinion that "when Indian reservations were created, either by treaty or executive order, the Indians held the land by the same character of *title*, to wit, the right to possess and occupy the lands for the uses and purposes designated." (Italics added.) See also *Ex parte Wilson*, 140 U. S. 575, 577. The long-continued exercise by the Executive of the power on the public behalf of establishing Indian reservations by mere Executive order had been so long acquiesced in by Congress (until prohibited by Act of June 30, 1919, c. 4, 41 Stat. 3, 34, § 27, Title 43, U. S. C. § 150),[7a] that this Court regarded it in *United States* v. *Midwest Oil Co.*, 236 U. S. 459, 472-473, as placing the validity of Executive orders beyond question. Cf. *Mason* v. *United States*, 260 U. S. 545, 553. Congress itself, by Act of May 29, 1830, c. 208, 4 Stat. 420, 421, § 4, in providing for the pre-emption of the public lands had said, "• • • nor shall the right of pre-emption, contemplated by this act, extend to any land, which is reserved from sale by act of Congress, *or by order of the President*, or which may have been appropriated, for any purpose whatsoever." (Italics added.)

[7a] This section provides, "no public lands of the United States shall be withdrawn by Executive order, proclamation, or otherwise, for or as an Indian reservation except by Act of Congess."

See also the Act of September 4, 1841, c. 16, 5 Stat. 453, 456, § 10. And the validity of such Executive orders was repeatedly adjudicated in cases involving all manner of rights in Executive-order reservations except those directly involving the rights of the Indians against the United States. See, generally, COHEN, *Handbook of Indian Law* (1942), pages 299-302.

From this, it is plain that in 1880 no one on the part of the United States could have supposed that the lands included within the Executive-order addition were not a part of the "present reservation" of the Utes. It cannot be assumed that the United States felt it was not acquiring this part of the reservation from the Indians. And it therefore will not do to say, as did the court below, that the United States had some nice appreciation of its own "title" and of the non-title of the Indians which caused it to speak in § 3 of the act of 1880, of lands not allotted "the title to which is * * * released and conveyed to the United States."

Sioux Tribe v. *United States*, 316 U. S. 317, itself is not authority for what respondent and the court below contend. In that case, the Court (316 U. S. at p. 326) after pointing out that the delegation to the Executive of the power of Congress to withdraw public lands from sale could be spelled out from long-continued congressional acquiescence in the executive practice, added: "The answer to whether a similar delegation occurred with respect to the power to convey a compensable interest in these lands to the Indians must be found in the available evidence of what consequences were thought by the executive and Congress to flow from the establishment of Executive order reservations." Applying that test, the Court found that the Executive and Congress had generally treated Executive order reservations as having a less certain and fixed tenure than those created by treaty or statute and as not having been intended to vest

the Indians with a title valid as against the United States; and that in particular the Sioux Executive order reservations had been so treated (316 U. S. at pp. 319-323). It concluded the Sioux reservations in question had been set up for a temporary purpose (that of handling the liquor traffic), without any intent on the part of the Executive and Congress to vest any permanent or compensable interest in the Sioux Tribe. In the present case, the President issued the Executive order for the purpose of settling the boundary dispute; to do so, he added the land to the reservation purposely that it might become incorporated in, be used for the same permanent purposes, and have the same status, as the other land already admittedly encompassed within the treaty boundaries. From 1875 to the time of the Act of 1880, it was never treated by the executive branch as having any different status than the other land. And when Congress passed the Act of 1880, it accepted this executive practice and made no differentiation as to the lands then embraced within the reservation. This was no situation, as in the *Sioux* case (316 U. S. at p. 320), where a mere temporary law-enforcement purpose was to be served, settlers retaining their rights within the Executive-order addition. Here, settlers were specifically excluded during (R. 32) the time the entire reservation remained in possession of petitioners, and thereafter (17 Op. Atty. Gen. 262) until specifically made available to settlement by Act of Congress (Act of July 28, 1882, c. 357, 22 Stat. 178, 1 Kappler 205)—which act preserved the rights of petitioners to have the lands sold and their proceeds held in trust. (The fact that in the *Sioux* case the agency buildings were outside the reservation, somewhat relied on by respondent in opposition to the petition for certiorari, Brf., p. 12-13, was purely coincidental: the Indians did not claim ownership of the land on which they were built, nor was the land set aside in settlement of any claim.) In hte *Sioux* case, the Indians were

confronted with their own cession of their lands in 1876 for a consideration which they had received (316 U. S. p. 323-324). Here the petitioners, under the Agreement of 1880, retained the beneficial interest in the proceeds of sale of the lands.

The 1880 act itself shows that Congress and the President treated this particular Executive order as giving the same title to the Indians as they had to their other lands. Congress canvassed the bill (S. 1509, 46th Cong., 2d Sess.) which became the Act of 1880 very thoroughly. House Report No. 1401, S. Exec. Doc. 114, Part 2, 46th Cong., 2d Sess., and the debates, June 1880, 10 Cong. Rec., Part 5, 46th Cong., 2d Sess. Nowhere did anyone draw any distinction between the Executive order and the other lands of petitioners. Thus, the act itself provides that the Indians shall be paid for their improvements—quite without respect to whether or not the improvements are located in the Executive order addition or elsewhere. And shortly after the agreement, the Attorney General by decision of January 17, 1882, held that despite the removal of the White River Utes from Colorado under the agreement, the reservation might not even then be disposed of by sales under the public land laws without additional legislation, since the allotments provided for by the agreement had not as yet been made. (17 Op. Atty. Gen. 262, 264.) Had anyone supposed that the United States owned the Executive order lands free of the trust provided for by the agreement, the executive officers of the government unquestionably would have so ruled—since it was in the area towards which prospectors and settlers were directing their most energetic attention. S. Exec. Doc. 29, 46th Cong., 2d Sess., pp. 41-43. The object of the Agreement of 1880 was settlement of the Indians in severalty and the giving up of the acreage required for their nomadic life, i. e., the acquisition by respondent of all of their lands not needed for allot-

ment. This object would not have been accomplished in its entirety if the Act of 1880 (the agreement) were interpreted so as to mean that petitioners, in addition to their right to individual allotments, had retained and not ceded, the approximately 600,000 acres of land embraced in the Executive order. Certainly, were the situation reversed, the United States would have properly ridiculed any contention of petitioners at the time that the agreement did not effect a cession of the Executive order lands along with the balance of the reservation.

In the court below and the brief in opposition in this Court (pages 15-16) some argument was made that the Agreement of 1880 cannot be regarded as intended by Congress to grant the Indians an advantage, because Congress was bent upon avenging the Meeker Massacre of 1879, its temper was to keep the Indians from payment of their money until the guilty ones were apprehended; and Congress did not intend to "gratuitously assume the burden petitioners contend for." There was nothing, of course, gratuitous about the deal which the United States made with petitioners in 1880. The United States achieved the purpose of its citizens to throw these lands with their rich minerals open to the white civilization. In return, the United States agreed not to profit in its capacity as a trustee from the transaction, but to pay the Indians just what the lands would bring after reimbursing the United States for its expenses and advances. If we grant that the Congress adopting the Act of 1880 was vindictive or vengeful (and if it were, it is hard to see how § 3 could have been agreed to by it at all), still that would only further confirm that Congress intended to include the Executive order lands within the cession by the Indians and to conclude all rights of petitioners in those lands. It cannot be seized upon to show that the trustee intended to make a secret profit at its ward's expense from the lands in question.

As to the Meeker Massacre itself, it is worth while to note that it is a rather plain case, so far as petitioners are concerned, and judged by standards of civilized nations, of justifiable warfare on their part. The Treaty of 1868 had solemnly promised exclusion of whites, it being provided (Article II) that—

> "* * * the United States now solemnly agree that no persons, except those herein authorized so to do, and except such officers, agents, and employes of the government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law shall ever be permitted to pass over, settle upon, or reside in the territory described in this article, except as herein otherwise provided." 15 Stat. 619, 620.

The treaty also (Art. VI) provided that if "bad men" among the whites should commit any wrong upon the property of the Indians, the United States would arrest and punish the offender and also reimburse the injured person for the loss sustained.[8]

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[8] Notwithstanding this guaranty, the Indian lands were being overrun both before and after the Meeker massacre. After Secretary of the Interior Carl Schurz, through the President, under date of May 25, 1880, had implored Congress to ratify the agreement of 1880, he sent a second communication to Congress stating that (Ex. Doc. 114, Part 2, Senate, 46th Congress, 2nd Sess.):

> "Collisions between persons, who, without authority, are invading the territory of the Ute Reservation in Colorado and the Ute Indians are evidently threatening; and it is to be feared that if hostilities now occur, even that part of the Ute Tribe which is most friendly to the government may be involved in them, under the impression that having made an agreement with them, and leaving it unacted upon, we have been acting in bad faith, merely desiring to deprive them of their lands without consideration.
>
> "Speedy action upon the agreement in question seems, therefore, of the highest importance, and I beg leave to suggest that you commend once more this subject to the immediate attention of Congress."

With this communication he endorsed a letter of May 18, 1880 from Charles Adams, who had been Special Agent in the negotiation of the agreement of 1880. Mr. Adams, in part, said:

The massacre took place because the Indians thought their land was being invaded in violation of this solemn covenant. It had its inception in a dispute between the Indian Agent and a family of Indians as to whether certain land along the bank of a stream which was used by them for pasture for their horses should be plowed by the Agent for Agency purposes. Although the Indians were willing that the Agent could plow other land for his purposes, he insisted over their protests on plowing the land used by them.[9]

Following the protests, a warning shot was sent near the body of the plowman [10] Meeker, the agent at White River, called for support from the United States Army—but said nothing to the Indians about his request. When the Indians learned of the unexplained advance upon their terri-

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"The people of the State of Colorado, and thousands of adventurers and immigrants from other States, have made up their minds to explore, overrun, and possess these lands, and all the troops now in Colorado cannot keep them out, as it would be simply impossible to guard all the mountain passes. The Indians themselves consider that they have virtually given up their lands, and in case they derive no benefit thereby it will be only a question for them whether to accept the inevitable peaceably or retaliate by the only mode known to them—war in the most cruel and barbarous manner. They do not understand why a solemn agreement urged upon them and entered into with them by one branch of the government may be rejected by another branch, but much less do they understand why a matter which seemed so urgent and was considered as preventing a war two months ago has not been acted upon, and this delay and uncertainty suggests to their minds the idea that the government is using this delay to allow its soldiers and all others who wish to gain a firm foothold on the reservation, and then declare the agreement not approved, but hold the lands; and while still their chief Ouray and their agent can and do control them, a very few days may change the present status of affairs."

[9] Officially, the story is found in the Report of the Commissioner of Indian Affairs for 1879, pp. xviii to xxxviii; also in S. Doc. 27, 46th Cong., 2d Sess., *passim*.

[10] Compare the current civilized practice of firing a warning shot over the bow of an alien vessel invading territorial waters—as in the recent incident in the coastal waters of Albania.

tory and community of the troops, they considered it a hostile act of war. Meeker was so informed by the Indians [11] and conveyed to the commanding officer (Major Thornburgh) the Indians' request that the troops camp beyond the reservation, and that Major Thornburgh come in to the agency for a conference. In this request Meeker concurred. Notwithstanding the request, the troops persisted in their march to the reservation. Thereupon, hostilities commenced. Meeker and his male employees were slaughtered. Let Commissioner Manypenny tell the story (*Our Indian Wards* [1880], p. 432):

> "The news carried by the Indian runner to [Chief] Douglas' camp on the 29th of September that the troops and the Indians were fighting, was calculated to inflame the minds of the warriors who heard it. They had understood that Major Thornburgh would camp his troops, and come in to a conference, as they had suggested, and had shown symptoms of delight when this was told them. To have this good news not only dissipated, but to learn that a battle was going on, filled them with indignation. They realized that a deception had been practiced upon them, and believed that the agent and his employes were parties to it, and in their savage wrath they slew all of them. * * *"

Manypenny reports that General Sheridan announced that in default of the immediate surrender of the Indians committing the outrage, the Utes would be "exterminated"; while General Sherman, with no greater restraint, said that while they could not surrender up the twelve Indians participating in the massacre, if they did not do so "they must 'disappear from the face of the earth.'" *Id.*

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[11] As Meeker wrote at the time, "The Indians seem to consider the advance of the troops as a declaration of real war." Manypenny, *Our Indian Wards* (1880), p. 426.

Manypenny thus appraises the situation (*id.*, pp. 434-435):

"Among the crimes for which the general of the army holds the Utes responsible, is the killing of Maj. Thornburgh and such of his command as fell on the 29th of September, 1879. Let this matter be looked at calmly and impartially. Maj. Thornburgh was ordered to the Ute reservation, for the purpose of affording the agent assistance, and to make arrests at the agent's suggestion, and to hold as prisoners such Indians as might be indicated. He is advised by the agent, as he approaches, but before he reaches the boundary of the reservation, that the Indians desire him to stop and camp his troops, and come in with a few officers, to the agency, for a conference, and to this Mr. Meeker said he agreed. Maj. Thornburgh replied *that his orders from the general of the army were such that he could not comply.* He said he was, by his orders, required to march his command to the agency. The Indians had protested; they considered this an invasion of their country, a challenge to battle, an act of real war, and, as such, they accepted it. As Gen. Sherman was the author of the order, and Major Thornburgh, in attempting to execute it, did, in the opinion of his superior, 'exactly right,' it seems clear that the calamity came from the attempt to perform what was required by the order. If some discretion had been given to Maj. Thornburgh, and, in the exercise of this, he had complied with the request of the Indians, to which the agent agreed, and camped his troops before, or even soon after he had entered the reservation, every one will admit that no battle could have taken place between the Indians and the troops, and hence no occasion have arisen for the tragedy at the agency. In his testimony before the joint committee of the Forty-fifth Congress, Gen. Sherman admitted that a large discretion should be allowed in the Indian service. In his instructions to Maj. Thornburgh, his or-

ders were imperative, and that officer was in the line of his duty in attempting to execute them. Let the responsibility for the sad calamity at Milk creek, and the afflicting tragedy at White river agency, on September 29, 1879, rest upon the proper party."

Conclusion

Petitioners reasonably understood that they owned the Executive-order lands when they entered into the agreement of 1880 proposed by Congress. The United States, including Congress, knew of their understanding. There is no basis to believe but that the United States also thought petitioners owned or had "title" to the Executive-order lands; and the minds of the parties met on that view. In any event, the understanding of the Indians having been established, that understanding must prevail.

The parties having entered into a formal agreement, ratified by Congress, for the sale of all their reservation including the Executive-order lands, the case comes squarely within this Court's ruling in *Sioux Tribe* v. *United States*, 316 U. S. 317, 326, that:

> "• • • where lands have been reserved for the use and occupation of an Indian Tribe by the terms of a treaty or statute, the tribe must be compensated if the lands are subsequently taken from them. *Shoshone Tribe* v. *United States*, 299 U. S. 476; *United States* v. *Shoshone Tribe*, 304 U. S. 111; *United States* v. *Klamath Indians*, 304 U. S. 119."

And under *United States* v. *Alcea Band of Tillamooks, et al.*, decided November 25, 1946, No. 26 O. T. 1946, it would follow from both the opinion of the Chief Justice (pamphlet p. 11 to 12) and the dissent of Mr. Justice Reed (pamphlet p. 3) that where, as here, the United States has proceeded

in accordance with a recognition of a property right of the Indians, their property interest cannot thereafter be taken from them without just compensation.

The judgment below should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 141.

THE CONFEDERATED BANDS OF UTE INDIANS, *Petitioners*,

v.

THE UNITED STATES.

On Writ of Certiorari to the Court of Claims.

REPLY BRIEF OF PETITIONERS.

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REPLY BRIEF OF PETITIONERS.

I. The Executive Order of 1875.—Respondent purports to misunderstand the basis of petitioners' case, pretending that it depends upon the efficacy of the Executive Order of 1875 to vest in petitioners a compensable interest in the lands which it covered. (Respt's. Brf. p. 19.) But the case petitioners have presented, irrespective of the efficacy *vel non* of the Executive Order of 1875, is that the United States agreed in 1880 for a valuable *quid pro quo* to hold the proceeds of these Executive-order lands (together with the balance of petitioners' reservation as it existed in 1880) for the benefit of petitioners, but thereafter, in derogation of its trust, by the Executive Order of 1882, took and converted these lands to its own proprietary use.

Apparently, respondent has placed the emphasis which it does upon the Executive order of 1875 in an attempt to confuse the issue by importing into the case at this stage

much provoking matter, not in the record here, nor in the record of the court below,[1] which is irrelevant to the issues upon which this Court granted the writ of certiorari or upon which petitioners have presented their case in their brief. These materials relate to a controversy over the location of a survey made in 1875 by one J. W. Miller. Respondent in one part of its brief contends that Miller did not pretend to run the north line of the reservation at all, (Respdt's Brf. pp. 8-9) in another that he ran the north line of the reservation south of the point where it ought to have been run. (Respdt's Brf. p. 10) But the determination of the propriety of the Miller survey is entirely irrelevant to the case presented below and in this Court, which is based on the taking in 1882 of lands which respondent agreed to sell for petitioners' account by the agreement of June 15, 1880. The importance of the 1875 Executive order consists, not in the fact that it established an indefeasible title in petitioners, but in the fact that the land covered by the order was a part of petitioners' "present reservation" by the Agreement of 1880, which respondent agreed to hold in trust for sale for petitioners' benefit. By 1880, the Government had formally ruled, despite insistence that the erroneous survey had negatived the Executive order, that "The question of the right of [petitioners] occupancy is not affected by the accuracy of Mr. James W. Miller's sur-

[1] The entire statement of facts of respondent is suffused with statements about the erroneous survey of J. W. Miller. (Respdt's. Brf. pp. 7-13.) Footnote 3 on page 8 of respondent's brief, for instance, refers to such things as the field notes of one Darling's and Miller's surveys and their instructions (Respdt's. Brf. pp. 58-70)—entirely *dehors* the record here and in the court below. Likewise, none of the material added as an appendix to respondent's brief (pp. 58-70), including the map either prepared for or by counsel for respondent was a part of the record below. True there was evidence before the court below as to whether the Miller survey was, or was not, correct, but the court below paid no attention to the point—apparently for the obvious reason that it is immaterial with respect to the scope to be accorded the agreement of 1880. In any event, the new materials added as an appendix to respondent's brief, are brought to the attention of the Court now on the appeal as an afterthought.

vey" (S. Exec. Doc. No. 29, 46th Cong., 2d Sess., p. 42, quoted at R. 32), and that "all lands withdrawn by said executive order are reserved as Indian lands, and are not, therefore, regarded as a part of the public domain for any purpose whatever, and that white settlers thereon are trespassers, and will be removed by the government, with the aid of the military, if necessary." (R. 35; S. Exec. Doc. No. 29, 46th Cong., 2d Sess., p. 44.)

Whether or not there was an error in the survey of the north boundary is wholly immaterial. Whether or not the Executive order itself conveyed, in the circumstances, an unimpeachable title to petitioners is irrelevant. The fact is that in any view which might have been taken by the parties at the time, petitioners had an interest in these lands, which they could and did "release" to respondent.

The attempt to import into the case in this Court a new ground of defense—available and known to respondent below—should fail. It does not meet the issue upon which the case has been presented (see paragraphs 7-8 inclusive of petitioners petition in the court below, R. 3); it undertakes to make petitioners' position appear quite different from what it actually is; and it is an attempt to change in this Court the theory upon which the case was tried and disposed of below. This is improper. *New York, L. E. & W. R. Co.* v. *Estill*, 147 U. S. 591, 614-615; *Virginian R. Co.* v. *Mullens*, 271 U. S. 220, 227-228.

II. The Act of 1880. Respondent's contention that respondent by the Act of 1880 did not commit itself to compensate petitioners for the Executive-order land ignores all provisions of the Act of 1880, 21 Stat. 199, except Section 3.[2] Yet it should be noted that Section 3 is not the granting clause of the Agreement of 1880, for Section 3 merely provides that "all the lands not so allotted, the title

[2] Thus respondent in setting out in its appendix the pertinent provisions of the 1880 Act (respondent's brief 56, 57) prints only Section 3 of that particular act. The entire act is printed as a separate appendix to this brief.

to which is, by *the said agreement* (meaning the preliminary agreement) * * *, and this acceptance of the United States, *released* and *conveyed* to the United States, shall be held and deemed to be public lands of the United States and subject to disposal under the laws providing for the disposal of the public lands," etc. When we refer back to the preliminary agreement to see what lands were released and conveyed to the United States, we find that in the second paragraph the chiefs and headmen agreed to use their best endeavors with their people "to procure their consent to cede to the United States *all the territory* of the *present Ute Reservation* in Colorado." This consent was obtained when the Act of June 15, 1880, was ratified by three-fourths of petitioners.

The final agreement therefore consisted of a promise on the part of petitioners to release and convey "all the territory" of their then "present reservation" to respondent, and a correlative promise on the part of respondent to sell for petitioners' account all of petitioners' land, including the Executive-order strip. This is further substantiated by the preamble of the final agreement, which recites that the Ute Indians have submitted to the Secretary of the Interior "an agreement for the sale to the United States of their *present reservation* in the State of Colorado." By thus relating Section 3 to the other provisions of the agreement, it is apparent that all petitioners' lands were to be released and conveyed. And unless Section 3 is thus related to the other provisions of the agreement, it becomes necessary for the Court to ignore the other provisions of the agreement, which is not proper statutory construction. It is therefore obvious that the use of the word "title" in Section 3 of the final statute-agreement was not intended to cut down on the area of the land to be ceded by the preliminary agreement.

The fallacy of the opinion below is its naked assumption that the word "title" meant some kind of a fee.[3] But this

[3] The only support respondent offers for this view is its bare assertion "Words could hardly be clearer."

was not true with respect even to the land petitioners had received under the Treaty of 1868. The pertinent part of Article II of the treaty reads: "The United States agree that the following district of country * * * is hereby, set apart for the absolute and undisturbed use and occupation of the Indians herein named * * *." Petitioners had, therefore, only the usual "Indian title" to their reservation—not a fee simple. *United States* v. *Alcea Band of Tillamooks*, No. 26, O. T. 1946, decided November 25, 1946, pamph. op. p. 6. Since the bulk of the territory to be released under the 1880 act was held by petitioners under a title that was far from being an absolute legal title, this fact in itself would negative an intention of Congress to limit the definition of the term "title" to a fee estate. Congress could not be supposed to have used that term to include the inferior estate received under the Treaty of 1868 and at the same time to exclude the inferior estate received under the Executive order of 1875. The word "title" has always been a word of variable meaning and is often, as here, used to connote whatever interest the grantor, releasor or claimant possesses. *Roberts* v. *Wentworth* (1849), 59 Mass. 192, 193; *Mulkins* v. *Snow* (1919), 175 N. Y. S. 41, 44, 106 Misc. 556, 560; *Irving* v. *Brownell* (1849), 11 Ill. 402, 415; *Skelly Oil Co.* v. *Kelly* (1931), 134 Kans. 176-179, 5 P. (2d) 823, 824; *Christy* v. *Nicholson* (1892), 48 Kans. 177, 29 Pac. 398; *Haynsworth* v. *Bischoff* (1873), 6 S. C. (6 Rich.) 159, 167. In the first of these cases, the Supreme Judicial Court of Massachusetts said:

> "A party may have a title to property although he is not the absolute owner. If he has the actual or constructive possession of property or the right of possession, he has a title thereto, although another party may be the owner."

Thus, too, it has been held that where jurisdiction has been granted to determine actions between individual Indians as to "*title* to real estate on [their] reservations," the word "title" embraced the "limited right of occupancy which the

individual Indian" acquired by allotment or by appropriation, cultivation or improvement. *Mulkins* v. *Snow, supra.*

In *Irving* v. *Brownell, supra,* the Supreme Court of Illinois in determining the nature of title that had to be proved under a statute pertaining to delinquent tax sales, said:

> "The word 'title' as used in the act of 1835, should not, therefore, be construed to mean a perfect title, nor is the word, in its ordinary acceptation, understood in such a restricted sense. There are perfect titles and apparent or imperfect titles. Even a naked possession constitutes a species of title, though it be of the lowest degree. The meaning of the word is, therefore, to be ascertained from the connection in which it is used, * * *" (p. 316).

Just so with the statute here involved. Only by interpreting the word "title" in the Act of 1880 to include the right of possession, which petitioners had, can § 3 be made consistent and harmonious with the rest of the statute. "Release" is the traditional language of quitclaim, which is always adequate consideration for a conveyance. It matters not whether petitioners' claim was a compensable interest of the type referred to some 62 years later in *Sioux Tribe* v. *United States, supra.* The point that respondent completely overlooks is that a release of a claim to possession is the giving up of a claim to title and is every bit as good a consideration for an agreement to pay as is a fee simple or warranted title. As stated by the Court of Claims some 36 years ago in litigation between the same parties and in answer to a similar argument of respondent (*Ute Indians* v. *United States,* 45 C. Cls. 440, 466):

> "Even if we may admit that they [the Utes] had no valid title to any lands, yet they *claimed* some title and honestly claimed it, and the yielding of such a claim to a party who wishes to purchase it is a good consideration."

And as stated by this Court in *Sykes* v. *Chadwick,* 18 Wall. 141):

> "If any release [and that is what petitioners here gave] is deemed requisite to confirm the title of lands with which one has been connected, though by a proper construction of the law he has no interest in them whatever, still such release will be a good consideration for a promise or for the payment of money."

Moreover, even this Court at the time of the Agreement of 1880 did not consider that an Executive order would not convey the same title as any treaty or act of Congress, for ten years later this Court in *Spaulding* v. *Chandler*, 160. U. S. 394, 403, expressed the opinion that "When Indian reservations were created, either by treaty or executive order, the Indians held the land by the same character of title, to wit, the right to possess and occupy the lands for the uses and purposes designated."

Respondent argues that the fact that the word "title" was used in three prior treaties with the Utes (Respt's. brf. p. 35) creates an inference that the term must have been understood by them as meaning a technical compensable interest when they signed the 1880 Agreement. But by this argument respondent is hoist with its own petard, for an examination of the use of the word "title" in those three treaties indicates that in each instance, the word was used in a different context, none of which referred to a fee title.[4]

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[4] Article II of the treaty of October 7, 1868, (13 Stat. 673) provided that petitioners agreed to "cede, convey, and relinquish all claim, right, title, and interest in and to any and all of their lands within the territory of the United States" except the prescribed reservations. Here the Indians were releasing the species of title, if any, which they had held under the Mexican Government.

In Article III of the treaty of March 2, 1868, (15 Stat. 619) petitioners agreed to "relinquish all claims and rights in and to any portion of the United States or territories" except the prescribed reservation. In spite of the fact that this was a much broader release, the treaty makes no mention of the word "title". In Article VII, however, the president was authorized to "fix the character of the title held by each [Indian]". Whereas, in the treaty of 1863, "title" meant the communal tribal interest in lands, here it referred to an individual estate of undetermined quality.

The Act of April 29, 1874, (18 Stat. 36) ratifying an agreement between the parties required petitioners (Article I) to "relin-

Respondent's argument that because the Indians were told by the agent (Respt's. Brf. pp. 24-5) that they did not own the land on Douglass Creek in Wyoming, or in North Park, Colorado, or in Bear River Valley (R. 15) it follows that the Indians were never given to understand that they owned the Executive-order lands completely overlooks the fact that after promulgating the Executive order the Commissioner of Indian Affairs wrote to Agent Danforth stating that the Executive order "will enable you to assure the Indians of the exact location of the limits of their reservation as enlarged." (R. 20) With this letter the Commissioner enclosed a portion of a map of Colorado showing the portion withdrawn as the addition to the Indian reserve. (R. 20.) Since the agent was clamoring for action from Washington there is no doubt, contrary to what he had previously told them with respect to the lands farther north, that he followed instructions and notified the Indians of the addition to their reservation. The very fact that petitioners claimed and ordered whites off land in Douglass Creek in Wyoming, and in North Park and the Bear River Valley in Colorado, all of which are north of, and which they could reach only by crossing the Executive-order lands, shows that they certainly assumed that they owned the Executive-order lands.

The fact that the Executive-order addition is not mentioned in the legislative history of the 1880 Act proves, rather than disproves, that it was intended to be released and conveyed by the Indians. The parties were dealing with respect to the total lands that the Indians then possessed. The purpose of the treaty was to remove the White River Band, who lived in the northern part of the existing reservation, entirely out of the State of Colorado to land in

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quish to the United States all right, title, and claim and interest in" the described portion of the reservation. But the very next article of the agreement provided that "The United States shall permit the Ute Indians to hunt upon said lands so long as the game lasts * * *". Under the authorities cited above even this constituted a grant of a species of "title."

Utah, the Uncompahgres to land farther west, and the Southern Utes to land in Southern Colorado where they were to be given individual allotments. That purpose of the agreement would not have been accomplished if the lands embraced within the Executive order were still to continue in Indian possession and not be released to the United States. The only clear inference from the fact that the Executive-order lands are not mentioned in the legislative history is that they were to be conveyed along with the balance of the Indian land. If in the historical setting of this agreement the United States did not intend to pay for these lands, its silence amounted to a fraud. (Petrs.' Brf. pp. 21-22.) It cannot possibly be that the Indians had a right to continue possession of the Executive-order lands, notwithstanding the Agreement of 1880. This was recognized by the court below in the opinion of Judge Whitaker, which opinion respondent now characterizes as "mere speculations." While it is to be admitted that the opinions of the court below cannot be referred to for the purpose of "eking out, controlling or modifying the scope of the findings" of fact, it is settled that the opinion may be referred to for the purpose of clarifying the meaning of findings made by the court, *American Propeller & Mfg. Co.* v. *United States*, 300 U. S. 475, Judge Whitaker's opinion properly shows the understanding the court below had of its own findings.

Respondent attempts to lift itself by its own boot straps by referring to its taking of the lands in 1882 as an administrative interpretation that it had a right to do so without compensating the Indians for the land embraced within the Executive order. There is nothing in the history of the Executive order of 1882 to indicate that it was a studied interpretation of the right of the government to take back the lands. There is no evidence of any kind that it was ever passed upon by any legal officer of the government. If the taking of lands by the government could, as respondent here argues, be held *ipso facto* to be an administrative interpretation of the right of the government to take such lands, it would be impossible for any Indian Tribe to ever recover for the taking of lands. Respondent cannot exalt its taking

in derogation of its trust into an administrative construction showing that petitioners had no right. The unilateral appropriation of the land in question in 1882 does not change the meaning of the Act of 1880, any more than the conduct of the Government changed the rights of other Indian Tribes. (*United States v. Creek Nation*, 295 U. S. 103, 110; *Shoshone Tribe* v. *United States*, 299 U. S. 476, 496, 498; *United States* v. *Klamath & Moadoc Tribes*, 304 U. S. 119, 123; *United States* v. *Alcea Band of Tillamooks, et al.*, No. 26, O. T. 1946, decided November 25, 1946.)

III. Res judicata.—Respondent, to support the judgment below, relies upon a ground of decision not passed upon by that court—nor, indeed, properly before it or before this Court. Respondent says that in a suit entitled *Ute Indians* v. *United States*, 45 C. Cls. 440, 46 C. Cls. 225, brought pursuant to the Indian Appropriation Act of March 3, 1909, c. 263, 35 Stat. 781, 788-9, petitioners recovered for all sales and public reservations of the land under the Agreement of 1880 up to June 30, 1910, and that although petitioners received in that case nothing for the Executive-order lands taken in 1882, this claim is *res judicata*.

The record does not support the assertion that the prior case could be or is *res judicata* of the present action. The jurisdictional act under which the present action was brought, Act of June 28, 1938, c. 776, 52 Stat. 1209, as amended specifically provides (§ 5):[5]

> "No payment or payments which have been made by the United States *upon or in satisfaction* of any claim or claims asserted in any suit brought hereunder or expended for any of the aforesaid bands of Ute Indians or members thereof shall apply as an estoppel against any suit brought hereunder, but there shall be set off against any recovery obtained by any band of said Indians hereunder, any payment made by the United States on any claim asserted * * *." [Italics added]

[5] Respondent entirely ignores this provision of the jurisdictional act under which the present suit is brought.

The jurisdictional statute thus prohibits dismissing petitioners' case on the ground of *res judicata*, although it permits respondent to set off any payments already made.

But if this were not so, still respondent failed to plead in the Court below the prior petition in and judgment of the Court of Claims, as is required for a plea of *res judicata* to be sustained. *Bryar* v. *Campbell*, 177 U. S. 649, 654-655. The matter not having been pleaded below, and the prior petition in and judgment of the court not having been made a part of the record either below or in this Court, and not being here for the examination of this Court, the belated contention of respondent as to *res judicata* is clearly unwarranted.

But even if respondent could here avail itself of the defense of *res judicata*, respondent cannot prevail under either of the two branches of that doctrine (which are confused in respondent's brief). The first branch, which is really what respondent urges be applied here, is that a prior suit on the same claim is an absolute bar to a subsequent suit even though certain grounds of recovery or defense were not even raised in the first suit; the second branch is that "where the second action * * * is upon a different claim * * * the judgment in the prior action operates as an estoppel * * * as to those matters" actually controverted and adjudicated.[6] *Cromwell* v. *County of Sac*, 94

[6] The classic statement of this Court with respect to the two branches of the doctrine of *res judicata* was made by Mr. Justice Field in *Cromwell* v. *County of Sac*, 94 U. S. 351, 352-353, as follows:

> "* * * In considering the operation of this judgment, it should be borne in mind, as stated by counsel, that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with

U. S. 351, 352; *Mercoid Corp.* v. *Mid-Continent Inv. Co.*, 320 U. S. 661, 671; *Federal Tr. Comm.* v. *Raladam Co.*, 316 U. S. 149, 152-3; *Tait* v. *Western Md. Ry. Co.*, 289 U. S. 620, 623; *Larsen* v. *Northland Transp. Co.*, 292 U. S. 20, 25. An examination of the limited jurisdictional act of March 3, 1909, clearly reveals that only two claims could be asserted thereunder: (1) a claim "on the rights of said Indians under" the Act of June 15, 1880, which meant an accounting for all lands sold under said act, and (2) a claim for the value of lands ceded by petitioners which had been taken and set apart as public reservations.

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them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. Thus, for example, a judgment rendered upon a promissory note is conclusive as to the validity of the instrument and the amount due upon it, although it be subsequently alleged that perfect defences actually existed, of which no proof was offered, such as forgery, want of consideration, or payment. If such defences were not presented in the action, and established by competent evidence, the subsequent allegation of their existence is of no legal consequence. The judgment is as conclusive, so far as future proceedings at law are concerned, as though the defences never existed. The language, therefore, which is so often used, that a judgment estops not only as to every ground of recovery or defence actually presented in the action, but also as to every ground which might have been presented, is strictly accurate, when applied to the demand or claim in controversy. Such demand or claim, having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law upon any ground whatever.

"But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action, to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action. * * *"

That act did not authorize a suit for the 1882 Executive-order taking, which was not a setting apart as a public reservation, but merely a restoration to the public domain. Under the authorities, therefore, the prior judgment cannot be set up as an absolute bar to the new claim here asserted, which is based exclusively on the Executive-order taking of 1882.

The question, therefore, reduces itself to that of whether, notwithstanding the limited language of the prior jurisdictional act, the claim here asserted was there actually litigated either *in toto* or *pro tanto*. An examination of the record in that case will reveal that the claims adjudicated, as authorized by the act, were confined to (1) an accounting for the proceeds of lands sold, and (2) a claim for the value of lands taken for public reservations, all of which were forest reserves. *Ute Indians* v. *United States*, Supra. As stated by court below in its findings, "the plaintiffs [petitioners] recovered a judgment for the proceeds of the cash sales of the land sold, plus the value of land reserved for public purposes, less offsets and deductions. None of these lands lay north of the true boundary of the reservation as described in the treaty of March 2, 1868 [*i. e.*, they did not include either the proceeds or the value of any lands within the Executive-order reservation] (15 Stat. 619). A supplemental judgment included additional sums received by the defendant [respondent] up to July 1, 1910." (Finding 17, R. 24.) Accordingly, even on the second branch of the doctrine of *res judicata* (estoppel by judgment) there can be no estoppel either *in toto* or *pro tanto*. *Cromwell* v. *County of Sac.*, *supra*.

Furthermore, if, as contended, respondent could have been made, in the prior suit, to account for the lands here in question, then respondent by its conduct in that case is estopped now to plead *res judicata*. There, the court called on the Secretary of the Interior to account for "the number of acres of land sold or disposed of by the United States from lands ceded under the agreement of June 15, 1880" (page 347 of record in *Ute Indians* v. *United States*, No.

30360 in the Court of Claims). In rendering that account, the Secretary did not report any sales made of land in the Executive-order strip (Finding 17, R. 23-4). Respondent did not therefor disclose any facts to the court upon which it could have made an adjudication as to the Executive-order lands. Further, respondent made no disclosure to the court that it had not accounted for lands within the Executive-order strip.[7] It would follow, therefore, that respondent, as trustee, on being required to account, falsely failed to account for the lands now in question—then asserts its own failure to account as *res judicata* which equity will not condone. The jurisdictional act here provides that the court shall apply against respondent "the same principles of law that would be applied against an ordinary fiduciary" (§ 3). And a trustee cannot in equity garner unto itself the property of its ward through the device of pleading a judgment upon its earlier wrongful accounting as *res judicata*. *Meredith* v. *First Tr. Co. of Albany* (1940), 23 N. Y. S. (2d) 953, 956, 260 App. Div. 517; *Roberts* v. *Michigan Tr. Co.* (1935), 273 Mich. 91, 121, 262 N. W. 744; *In re Evans' Est.* (1944), 62 Cal. App. (2d) 249, 257, 144 P. (2d) 625, 629. *Cf. Drummond* v. *United States*, 324 U. S. 316, 317-8.

Finally, even if respondent were correct that the 1910 judgment is conclusive upon petitioners since the matter might have been litigated, still it would be conclusive only as to sales of land made prior to June 30, 1910; for the accounting was brought down only to that date. (Finding 17, R. 24.) Petitioners would, therefore, still remain entitled to an accounting for all sales and disposals of the Executive-order lands made since 1910 and for the taking of the remainder of the lands by § 6 of the jurisdictional

[7] If, as we do not believe, respondent is entitled, without even putting in evidence the record of the prior case, to have this point of *res judicata* considered, then certainly petitioners are entitled to disclose what the record contains. This very situation, however, shows that, absent pleading and proof, this Court cannot here know or hold that the prior suit was *res judicata* of the present action.

act, Act of June 28, 1938 (c. 776, 52 Stat. 1209, § 6, as amended by Act of July 15, 1941, c. 299, 55 Stat. 593). *Confederated Bands of Ute Indians* v. *United States*, 100 C. Cls. 413. Consequently, the 1910 judgment and the doctrine of *res judicata* cannot possibly sustain the judgment below in the present case.

CONCLUSION.

The judgment below should be reversed.

Respectfully submitted,

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CHARLES ELMORE CROPLEY

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 141.

THE CONFEDERATED BANDS OF UTE INDIANS, *Petitioners*,

v.

THE UNITED STATES.

On Writ of Certiorari to the Court of Claims.

APPENDIX TO REPLY BRIEF OF PETITIONERS CONTAINING AGREEMENT OF JUNE 15, 1880 (21 STAT. 199).

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On Writ of Certiorari to the Court of Claims.

APPENDIX TO REPLY BRIEF OF PETITIONERS CONTAINING ACT OF JUNE 15, 1880 (21 STAT. 199).

CHAP. 223.—An act to accept and ratify the agreement submitted by the confederated bands of Ute Indians in Colorado, for the sale of their reservation in said State, and for other purposes, and to make the necessary appropriations for carrying out the same.

Whereas certain of the chiefs and headmen of the confederated bands of the Ute tribe of Indians, now present in the city of Washington, have agreed upon and submitted to the Secretary of the Interior an agreement for the sale to the United States of their present reservation in the

State of Colorado, their settlement upon lands in severalty, and for other purposes; and

Whereas the President of the United States has submitted said agreement, with his approval of the same, to the Congress of the United States for acceptance and ratification, and for the necessary legislation to carry the same into effect: Therefore

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That said agreement be, and the same is hereby, accepted, ratified, and confirmed: *Provided,* That the said agreement shall be amended by adding to the first clause thereof, after the words "guilty parties", the words following, to wit: "Until such surrender or apprehension, or until the President shall be satisfied that the guilty parties are no longer living or have fled beyond the limits of the United States, the proportion of the money, hereinafter provided, coming to that portion of the Ute Indians known as the White River Utes, except for removal and settlement, shall not be paid"; and by adding to the third express condition of said agreement after the word "forever", the words following, to wit: "*Provided,* That the President of the United States may, in his discretion, appropriate an amount thereof, not exceeding ten thousand dollars, for the education in schools established within or beyond the limits of the lands selected, of such youths of both sexes as in his judgment may be best qualified to make proficiency in practical industries and pursuits necessary for their self-support, and out of the portion of said moneys coming to the White River Utes, the United States shall pay annually to the following-named persons, during the period of twenty years, if they shall live so long, the following sums respectively: To Mrs. Arivella D. Meeker, five hundred dollars; to Miss Josephine Meeker five hundred dollars; to Mrs. Sophronia Price, five hundred dollars; to Mrs. Maggie Gordon, five hundred dollars; to George Dresser, two hundred dollars; to Mrs. Sarah M. Post, five hundred dollars; to Mrs. Eaton, mother of George Eaton, two hundred dollars; to the parents of Arthur L. Thompson two hundred dollars; to the father of Fred Shepard, two hundred dollars; to the parents of Wilmer Eskridge, two hundred dollars"; and by adding to the fifth express condition of said agreement after word "reaffirmed", the

words following to wit: "This sum, together with the annuity of fifty thousand dollars hereinbefore provided, may, in the discretion of Congress, at the end of twenty-five years, be capitalized, and the principal sum be paid to said Indians per capita in lieu of said annuities": *And provided also*, That three-fourths of the adult male members of said confederated bands shall agree to and sign said agreement, upon presentation of the same to them, in open council, in the manner hereinafter provided: *Provided further*, That nothing in this act contained, or in the agreement herein set forth, or in the amendments herein proposed to said agreement, shall be so construed as to compel any Ute Indian to remove from any lands that he or she claims in severalty. Said agreement is in words and figures as follows, namely:

The chiefs and headmen of the confederate bands of the Utes now present in Washington, hereby promise and agree to procure the surrender, to the United States, for trial and punishment, if found guilty, of those members of their nation, not yet in the custody of the United States, who were implicated in the murder of the United States Indian Agent N. C. Meeker and the murder of and outrages upon the employees at the White River Agency on the twenty-ninth day of September, eighteen hundred and seventy-nine, and in case they do not themselves succeed in apprehending the said parties, presumably guilty of the above-mentioned crime, that they will not in any manner obstruct, but faithfully aid, any officers of the United States, directed by the proper authorities, to apprehend such presumably guilty parties.

The said chiefs and headmen of the confederated bands of Utes also agree and promise to use their best endeavors with their people to procure their consent to cede to the United States all the territory of the present Ute Reservation in Colorado, except as hereinafter provided for their settlement.

The Southern Utes agree to remove to and settle upon the unoccupied agricultural lands on the La Plata River, in Colorado; and if there should not be a sufficiency of such lands on the La Plata River and in its vicinity in Colorado, then upon such other unoccupied agricultural lands as may be found on the La Plata River or in its vicinity in New Mexico.

The Uncompahgre Utes agree to remove to and settle upon agricultural lands on Grand River, near the mouth of the Gunnison River, in Colorado, if a sufficient quantity of agricultural land shall be found there, if not then upon such other unoccupied agricultural lands as may be found in that vicinity and in the Territory of Utah.

The White River Utes agree to remove to and settle upon agricultural lands on the Uintah Reservation in Utah.

Allotments in severalty of said lands shall be made as follows:

To each head of a family one-quarter of a section, with an additional quantity of grazing land not exceeding one-quarter of a section.

To each single person over eighteen years of age one-eighth of a section, with an additional quantity of grazing land not exceeding one-eighth of a section.

To each orphan child under eighteen years of age one-eighth of a section, with an additional quantity of grazing land not exceeding one-eighth of a section; and to each other person, under eighteen years, now living, or who may be born prior to said allotments, one-eighth of a section, with a like quantity of grazing land.

All allotments to be made with the advice of the commission hereinafter provided, upon the selection of the Indians, heads of families selecting for their minor children, and the agents making the allotment for each orphan child.

The said chiefs and headmen of the confederated bands of Utes further promise that they will not obstruct or in anywise interfere with travel upon any of the highways now open or hereafter to be opened by lawful authority in or upon any of the lands to be set apart for their use by virtue of this agreement.

The said chiefs and headmen of the confederated bands of Utes promise to obtain the consent of their people to the cession of the territory of their reservation as above on the following express conditions:

First. That the Government of the United States cause the lands so set apart to be properly surveyed and to be divided among the said Indians in severalty in the proportion hereinbefore mentioned, and to issue patents in fee simple to them respectively therefor, so soon as the necessary laws are passed by Congress. The title to be acquired

by the Indians shall not be subject to alienation, lease, or incumbrance, either by voluntary conveyance of the grantee or by the judgment, order, or decree of any court, or subject to taxation of any character, but shall be and remain inalienable and not subject to taxation for the period of twenty-five years, and until such time thereafter as the President of the United Sates may see fit to remove the restriction, which shall be incorporated in the patents when issued, and any contract made prior to the removal of such restriction shall be void.

Second. That so soon as the consent of the several tribes of the Ute Nation shall have been obtained to the provisions of this agreement, the President of the United States shall cause to be distributed among them in cash the sum of sixty thousand dollars of annuities now due and provided for, and so much more as Congress may appropriate for that purpose; and that a commission shall be sent to superintend the removal and settlement of the Utes, and to see that they are well provided with agricultural and pastoral lands sufficient for their future support, and upon such settlement being duly effected, that they are furnished with houses, wagons, agricultural implements, and stock cattle sufficient for their reasonable wants, and also such saw and grist mills as may be necessary to enable them to commence farming operations, and that the money to be appropriated by Congress for that purpose shall be apportioned among the different bands of Utes in the following manner: One-third to those who settle on the La Plata River and vicinity, one-half to those settling on Grand River and vicinity, and one-sixth to those settling on the Uintah Reservation.

Third. That in consideration of the cession of territory to be made by the said confederated bands of the Ute Nation, the United States, in addition to the annuities and sums for provisions and clothing stipulated and provided for in existing treaties and laws, agrees to set apart and hold, as a perpetual trust for the said Ute Indians, a sum of money, or its equivalent in bonds of the United States, which shall be sufficient to produce the sum of fifty thousand dollars per annum, which sum of fifty thousand dollars shall be distributed per capita to them annually forever.

Fourth. That as soon as the President of the United States may deem it necessary or expedient, the agencies

for the Uncompahgres and Southern Utes be removed to and established at suitable points, to be hereafter selected, upon the lands to be set apart, and to aid in the support of the said Utes until such time as they shall be able to support themselves, and that in the mean time the United States Government will establish and maintain schools in the settlements of the Utes, and make all necessary provision for the education of their children.

Fifth. All provisions of the treaty of March second, eighteen hundred and sixty-eight, and the act of Congress approved April twenty-ninth, eighteen hundred and seventy-four, not altered by this agreement, shall continue in force, and the following words from article three of said act, namely, "The United States agrees to set apart and hold, as a perpetual trust for the Ute Indians, a sum of money or its equivalent in bonds, which shall be sufficient to produce the sum of twenty-five thousand dollars per annum, which sum of twenty-five thousand dollars per annum shall be disbursed or invested at the discretion of the President, or as he may direct, for the use and benefit of the Ute Indians forever", are hereby expressly reaffirmed.

Sixth. That the commissioners above mentioned shall ascertain what improvements have been made by any member or members of the Ute Nation upon any part of the reservation in Colorado to be ceded to the United States as above, and that payment in cash shall be made to the individuals having made and owning such improvements, upon a fair and liberal valuation of the same by the said commission, taking into consideration the labor bestowed upon the land.

Done at the city of Washington this sixth day of March, anno Domini eighteen hundred and eighty.

CHAVANAUX	his X mark
IGNATIO	his X mark
ALHANDRA	his X mark
VERATZITZ	his X mark
GALOTA	his X mark
JOCKNICK	his X mark
WASS	his X mark
SAWAWICK	his X mark
OURAY	

Witnesses:

WILL F. BURNS, Interpreter.
W. H. BERRY, Interpreter.
OTTO MEARS, Interpreter.
HENRY PAGE, United States Indian Agent, Southern Utes.
CHARLES ADAMS, Special Agent.

SEC. 2. That the President of the United States be, and he is hereby, authorized and empowered to appoint, by and with the advice and consent of the Senate, five commissioners, who shall receive compensation for their services at the rate of ten dollars per diem while actually engaged, in addition to their actual traveling and other necessary expenses; and said commissioners shall, under such instructions as the Secretary of the Interior may give them, present said agreement to the confederated bands of the Ute Indians in open council for ratification, as provided in the first section of this act; and said commissioners shall have a clerk, at a salary of two hundred dollars per month, in addition to his actual traveling and other necessary expenses, and who shall give bond in an amount to be fixed by the Secretary of the Interior, and shall act also as disbursing officer for said commissioners. And upon the ratification of said agreement by said tribe as herein provided, said commissioners shall, under the direction of the Secretary of the Interior, appraise the improvements belonging to said Ute Indians upon the lands surrendered by them as provided in said agreement, and report the same to the Secretary of the Interior for settlement. It shall be their duty to take a careful census of said Indians, separating them under said census as follows:

First. Those known in the agreement above referred to as Southern Utes.

Second. Those known as Uncompahgre Utes.

Third. Those known as White River Utes.

Said census shall also show separately the name of each head of a family, and the number of persons in such family, distinguishing those over eighteen years of age from those under eighteen years of age, and giving the names of each separately; also, said census shall show separately the orphan children in each of said classes of Utes described in the foregoing agreement, and they shall make an accurate register of the names, ages, ocupations, and general

condition of each of the above classes as aforesaid, specifying particularly the number and names of said Indians incapable by reason of orphanage, minority, or other disability of managing their own affairs, and they shall also select lands and allot them in severalty to said Indians, as herein provided, and superintend the removal, location, and settlement of the Indians thereon, and do and perform such other services as the Secretary of the Interior may consider necessary for them to do in the execution of the provisions of this act.

And after the said commissioners shall have performed the duties specifically assigned to them by this act, and such other duties as the Secretary of the Interior may require of them, they shall make a full report of their proceedings to the Secretary of the Interior, which shall set forth, among other things, the name of each person to whom they may have apportioned and alloted lands as herein provided for, with the name and condition of such person, showing who, upon proofs, are considered incompetent to take charge of their property, either as orphans, minors, or for other causes; and shall also exhibit the quantity of land assigned to each person, with the metes and bounds of such allotments. And said commissioners shall make an accurate map of the whole survey and proceeding, showing the partition and division aforesaid, a copy of which map shall be filed with said report; and the Secretary of the Interior shall cause a copy to be filed in the General Land Office, and copies shall also be filed in the office of the surveyors-general of Utah, Colorado and New Mexico; and also in the office of the register and receiver of the land district in which such lands or any portion of them may be situate. Said commissioners shall further report the total number of acres allotted and set apart as provided by the foregoing agreement, the amount of such land tillable without irrigation, the amount of irrigation required, and the probable cost thereof. They shall also locate the agencies for the Southern Utes and the Uncompahgre Utes, shall furnish an estimate of the number of houses required, the cost of each, the number of school-houses required and the number of teachers, and the number of children of school age, and such other data as the Secretary of the Interior may require to enable him to make judicious expenditure of the money appropriated in section nine of

this act; and said commissioners shall exercise direct supervision and control of all expenditures under this act during the time they remain in the Ute country, under the general direction of the Secretary of the Interior; and they shall render a full and detailed account of such expenditure, with the vouchers therefor, as now provided by law.

SEC. 3. That the Secretary of the Interior be, and he is hereby, authorized to cause to be surveyed, under the direction of said commissioners, a sufficient quantity of land in the vicinities named in said agreement, to secure the settlement in severalty of said Indians as therein provided. And upon the completion of said survey and enumeration herein required, the said commissioners shall cause allotments of lands to be made to each and all of the said Indians, in quantity and character as set forth in the agreement above mentioned, and whenever the report and proceedings of said commissioners, as required by this act, are approved by the President of the United States, he shall cause patents to issue to each and every allottee for the lands so allotted, with the same conditions, restrictions and limitations mentioned therein as are provided in said agreement; and all the lands not so allotted, the title to which is, by the said agreement of the confederated bands of the Ute Indians, and this acceptance by the United States, released and conveyed to the United States, shall be held and deemed to be public lands of the United States and subject to disposal under the laws providing for the disposal of the public lands, at the same price and on the same terms as other lands of like character, except as provided in this act: *Provided*, That none of said lands, whether mineral or otherwise, shall be liable to entry and settlement under the provisions of the homestead law; but shall be subject to cash entry only in accordance with existing law; and when sold the proceeds of said sale shall be first sacredly applied to reimbursing the United States for all sums paid out or set apart under this act by the government for the benefit of said Indians, and then to be applied in payment for the lands at one dollar and twenty-five cents per acre which may be ceded to them by the United States outside of their reservation, in pursuance of this agreement. And the remainder, if any, shall be deposited in the Treasury as now provided by law for the benefit of the said Indians, in the proportion hereinbefore stated, and the interest

thereon shall be distributed annually to them in the same manner as the funds provided for in this act: *Provided further*, That the subdivisions upon which are located improvements to be appraised, as provided for in section two of this act, shall be offered to the highest bidder at public sale, after published notice of at least thirty days by the Secretary of the Interior, and the same shall be absolutely reserved from occupation or claim until so sold.

SEC. 4. That upon the completion of said allotments and the patenting of the lands to said allottees, each and every of the said Indians shall be subject to the provisions of section nineteen hundred and seventy-seven of the Revised Statutes and to the laws, both civil and criminal, of the State or Territory in which they may reside, with the right to sue and be sued in the courts thereof: *Provided*, That their lands and personal property shall not be subject to taxation or execution upon the judgment, order, or decree of any court obtained on any cause of action which may arise during the period named in the above recited agreement.

SEC. 5. That the Secretary of the Treasury shall, out of any moneys in the Treasury not otherwise appropriated, set apart, and hold as a perpetual trust-fund for said Ute Indians, an amount of money sufficient at four per centum to produce annually fifty thousand dollars, which interest shall be paid to them per capita in cash, annually, as provided in said agreement.

SEC. 6. That all salaries paid to any member or members of the Ute tribe under existing treaty stipulations shall be continued for the term of ten years beyond the time fixed in said treaties. And the sum of four thousand dollars per annum for the term of ten years shall be distributed by the President at his discretion to such of said Indians as distinguish themselves by good sense, energy, and perseverance in the pursuits of civilized life, and in the promotion of a good understanding between the Indians and the Government and people of the United States, and there is hereby appropriated, out of any moneys in the Treasury not otherwise appropriated, four thousand dollars as the first installment for such purpose.

SEC. 7. That the provisions of title twenty-eight of the Revised Statutes shall extend over and be applicable to every allotment of land provided for in the foregoing agreement, and to the administration of the affairs of said Indians, so far as said provisions can be made applicable thereto.

SEC. 8. That the hot springs located in what is known as "The Uncompahgre Park", in the Uncompahgre Valley, and four square miles of land surrounding said springs and within said valley, are hereby reserved, and withdrawn from settlement, occupancy, or sale, under the laws of the United States, and dedicated and set apart for the benefit and enjoyment of the people; and, so far as practicable, the provisions of sections twenty-four hundred and seventy-four and twenty-four hundred and seventy-five, of the Revised Statutes, are hereby made applicable to said tract.

SEC. 9. That for the purpose of carrying the provisions of this act into effect, the following sums, or so much thereof as may be necessary, be, and they are hereby, appropriated, out of any moneys in the Treasury not otherwise appropriated, to be expended under the direction of the Secretary of the Interior as follows, namely:

For the payment of the expenses of the commissioners herein provided, the sum of twenty-five thousand dollars.

For the cost of removal and settlement of the Utes, surveying their lands, building houses, establishing schools, building mills and agency buildings, purchasing stock, agricultural implements, and so forth, as provided in said agreement and in this act, the sum of three hundred and fifty thousand dollars.

For the sum to be paid to said Ute Indians, per capita, in addition to the sixty thousand dollars now due and provided for, the sum of fifteen thousand dollars.

For the payment of the appraised value of individual improvements as provided herein, the sum of twenty thousand dollars.

For the care and support of the Ute Indians in Colorado for the balance of the current fiscal year, the sum of twelve thousand dollars: *Provided*, That with the exception of the appropriation for expenses of the commissioners, the above appropriations shall become available only upon the rati-

fication of said agreement by three-fourths of the male adult members of the Ute Indians as provided in this act, and the certification of such fact to the Secretary of the Treasury by the Secretary of the Interior.

SEC. 10. If the agreement as amended in this act is not ratified by three-fourths of the adult male Indians of the Ute tribes within four months from the approval of this act the same shall cease to be of effect after that day.

Approved June 15, 1880.

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No. 141

In the Supreme Court of the United States

OCTOBER TERM, 1946

THE CONFEDERATED BANDS OF UTE INDIANS,
PETITIONERS

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS OF THE UNITED STATES

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinions of the Court of Claims (R. 24–38) are reported at 64 F. Supp. 569.

JURISDICTION

The judgment of the Court of Claims sought to be reviewed was entered on March 4, 1946 (R. 38). The petition for a writ of certiorari was filed on June 3, 1946. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939, 28 U. S. C. 288 (b).

QUESTIONS PRESENTED

1. Whether the Executive Order of November 22, 1875, withdrawing public land for the use of the several bands of Ute Indians, vested petitioners with a title in the land which requires the United States to pay compensation for the restoration of such land to the public domain by the Executive Order of August 4, 1882.

2. If not, whether the United States, by the Act of June 15, 1880, agreed to compensate the petitioners for such land notwithstanding the fact that they had no compensable interest in such land.

STATUTES, TREATIES, AGREEMENTS AND EXECUTIVE ORDERS INVOLVED

Articles II and III of the Treaty of March 2, 1868, 15 Stat. 619, 2 Kappler 765, 990, provides as follows:

> ARTICLE II. The United States agree that the following district of country, to wit: commencing at that point on the southern boundary line of the Territory of Colorado where the meridian of longitude 107° west from Greenwich crosses the same; running thence north with said meridian to a point fifteen miles due north of where said meridian intersects the fortieth parallel of north latitude; thence due west to the western boundary-line of said Territory; thence south with said western boundary-line of said Territory to the southern boundar-

line of said Territory; thence east with said southern boundary-line to the place of beginning, shall be, and the same is hereby, set apart for the absolute and undisturbed use and occupation of the Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit among them; and the United States now solemnly agree that no persons, except those herein authorized so to do, and except such officers, agents, and employes of the Government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law shall ever be permitted to pass over, settle upon, or reside in the Territory described in this article, except as herein otherwise provided.

ARTICLE III. It is further agreed by the Indians, parties hereto, that henceforth they will and do hereby relinquish all claims and rights in and to any portion of the United States or Territories, except such as are embraced in the limits defined in the preceding article.

The Executive Order of November 22, 1875, 1 Kappler 834, reads as follows:

EXECUTIVE MANSION,
November 22, 1875.

It is hereby ordered that the tract of country in the Territory of Colorado lying within the following-described boundaries,

viz: Commencing at the northeast corner of the present Ute Indian Reservation, as defined in the treaty of March 2, 1868 (Stats. at Large, vol. 15, p. 619); thence running north on the 107th degree of longitude to the first standard parallel north; thence west on said first standard parallel to the boundary line between Colorado and Utah; thence south with said boundary to the northwest corner of the Ute Indian Reservation; thence east with the north boundary of the said reservation to the place of beginning, be, and the same hereby is, withdrawn from sale and set apart for the use of the several tribes of Ute Indians, as an addition to the present reservation in said Territory.

Section 3 of the Act of June 15, 1880, 21 Stat. 199, 203, 204, 1 Kappler 180, 185, provides as follows:

> SEC. 3. That the Secretary of the Interior be, and he is hereby, authorized to cause to be surveyed, under the direction of said commissioners, a sufficient quantity of land in the vicinities named in said agreement, to secure the settlement in severalty of said Indians as therein provided. And upon the completion of said survey and enumeration herein required, the said commissioners shall cause allotments of lands to be made to each and all of the said Indians, in quantity and character as set forth in the agreement above mentioned,

and whenever the report and proceedings of said commissioners, as required by this act, are approved by the President of the United States, he shall cause patents to issue to each and every allottee for the lands so allotted, with the same conditions, restrictions, and limitations mentioned therein as are provided in said agreement; and all the lands not so allotted, the title to which is, by the said agreement of the confederated bands of the Ute Indians, and this acceptance by the United States, released and conveyed to the United States, shall be held and deemed to be public lands of the United States and subject to disposal under the laws providing for the disposal of the public lands, at the same price and on the same terms as other lands of like character, except as provided in this act: *Provided,* That none of said lands, whether mineral or otherwise, shall be liable to entry and settlement under the provisions of the homestead law; but shall be subject to cash entry only in accordance with existing law; and when sold the proceeds of said sale shall be first sacredly applied to reimbursing the United States for all sums paid out or set apart under this act by the Government for the benefit of said Indians, and then to be applied in payment for the lands at one dollar and twenty-five cents per acre which may be ceded to them by the United States outside of their reservation, in pursuance of this

agreement. And the remainder, if any, shall be deposited in the Treasury as now provided by law for the benefit of the said Indians, in the proportion hereinbefore stated, and the interest thereon shall be distributed annually to them in the same manner as the funds provided for in this act: *Provided further,* That the subdivisions upon which are located improvements to be appraised, as provided for in section two of this act, shall be offered to the highest bidder at public sale, after published notice of at least thirty days by the Secretary of the Interior, and the same shall be absolutely reserved from occupation or claim until so sold.

The Executive Order of August 4, 1882, 1 Kappler 834, 835, provides as follows:

EXECUTIVE MANSION, *August 4, 1882.*

It is hereby ordered that the following-described tract of country in Colorado, viz: Commencing at the northeast corner of the present Ute Indian Reservation, as defined in the treaty of March 2, 1868 (Stats. at Large, vol. 15, p. 619); thence running north on the 107th degree of longitude to the first standard parallel north; thence west on said first standard parallel to the boundary line between Colorado and Utah; thence south with said boundary to the northwest corner of the Ute Indian Reservation; thence east with the north boundary of the said reservation to the place of be-

ginning, withdrawn from sale and set apart for the use of the several tribes of the Ute Indians by Executive order dated November 22, 1875, be, and the same hereby is, restored to the public domain.

STATEMENT

By treaty of March 2, 1868, 15 Stat. 619, 2 Kappler 765, the United States established a reservation of about 15 million acres for petitioners.[1] The reservation was particularly described in Article II of the treaty (pp. 2–3, *supra*) as an area of land bounded on the east by the meridian of the 107th degree of west longitude; on the north by a line 15 miles north of the 40th parallel of north latitude; on the west by the western boundary of Colorado, and on the south by the southern boundary of Colorado. By Article III of the treaty the petitioners relinquished "all claims and rights in and to any portion of the United States or Territories, except such as are embraced in the limits defined in the preceding article." (Fdg. 3, R. 12).

Within the reservation so bounded the Government, pursuant to Article IV of the 1868 treaty, established the White River Agency at latitude 40°6′ north and longitude 107°40′ west (Fdg. 5,

[1] By agreement of September 13, 1873, ratified by the Act of April 29, 1874, petitioners ceded to the United States over 3 million acres of the land in the reservation thus established (Fdg. 4, R. 12).

R. 13). Survey of the northern boundary of the reservation was not made prior to 1875 (Fdg. 7, R. 16), and, between the time the reservation was established and that date, some difficulty resulted by reason of the fact that petitioners mistakenly thought the reservation so established extended farther north than was actually provided for in the treaty, even to the extent of making claim to lands in Wyoming (Fdg. 6, R. 13–16). In October or November, 1875, a survey of the north boundary was completed by one J. W. Miller. Miller ran the line west from a "certain corner," as instructed, but he knew that a line so run was not the correct boundary as provided in the treaty and that the line he did run was 15 to 18 miles south of the true north boundary. As a result of this error, the White River Agency was about ⅛ of a mile north of the erroneous line thus surveyed, and the White River Valley, while within the area actually covered by the treaty description, was likewise north of the Miller line (Fdg. 7, R. 16–18). In this situation the Secretary of the Interior, at the request of the Commissioner of Indian Affairs, requested the President to issue an executive order withdrawing "all that tract of country lying between the north boundary of the Ute Reservation, as defined in treaty of March 2, 1868, and the 1st standard parallel, north; and setting apart the same, as an addition to the present Ute Indian reservation in the

Territory of Colorado." Such order was issued on November 22, 1875 (pp. 3–4, *supra*). Fdgs. 8, 9, 10, R. 19–20.) While this order was regarded by the Commissioner of Indian Affairs as fully protecting "their improvements in the White River Valley and the Agency buildings," (Fdg. 11, R. 20), it will be observed that the order embraced an area wholly north of the true treaty boundary and thus north of the White River Valley and Agency, the exclusion of which by the erroneous Miller line led to issuance of the order.

By an agreement between the United States and petitioners, dated March 6, 1880, amended and ratified by the Act of June 15, 1880, 21 Stat. 199, 1 Kappler 180, the petitioners sold their reservation to the United States, excepting only certain lands for allotment to individual members. Section 3 of the Act (pp. 4–5, *supra*), after providing for allotments in severalty, directed that "* * * all the lands not so allotted, the title to which is, by the said agreement of the confederated bands of the Ute Indians, and this acceptance by the United States, released and conveyed to the United States, shall be held and deemed to be public lands of the United States * * *." The act proceeds to specify that the land be subject to cash entry and that the proceeds after certain deductions be deposited to the credit of the Indians. (Fdg. 12, R. 20, 21.)

Merely to remove doubts entertained by settlers as to their right to make entry and obtain patents, Congress by the Act of July 28, 1882, c. 357, 22 Stat. 178, 1 Kappler 205, declared the lands formerly occupied by the Uncompahgre and White River Utes to be public lands subject to disposal in accordance with section 3 of the 1880 Act, and on August 4, 1882, the President issued an executive order restoring to the public domain the land set aside for the use of the petitioners by the Executive Order of November 22, 1875. (Fdgs. 13, 14 and 15, R. 22, 23.)

Following the Act of 1880, the United States proceeded to sell the lands added to the treaty reservation by executive order in 1875 and restored to the public domain by executive order in 1882, as above outlined, as well as lands formerly in the treaty reservation. No accounting having been made to petitioners for lands so sold and other ceded lands reserved by the United States for public purposes, Congress by Act of March 3, 1909, c. 263, 35 Stat. 781, 788, 789, conferred power on the Court of Claims to hear, determine, and render final judgment on the "claims and rights" of petitioners under the agreement ratified by the 1880 Act, "including the value of all lands ceded by the said Indians (petitioners) which have been set apart and reserved from the public lands as public reservations * * *." Pursuant to such act petitioners brought suit in

the Court of Claims seeking recovery for the failure of the United States to dispose of the lands ceded by the agreement of 1880, for an accounting for lands sold, and for compensation for the lands reserved by the United States for public purposes, and petitioners recovered a judgment for the proceeds of cash sales of land, plus the value of lands reserved for public purposes. *The Ute Indians* v. *United States*, 45 C. Cls. 440, 46 C. Cls. 225 (1910). None of the lands so compensated for lay north of the true boundary of the reservation as fixed by the 1868 treaty (Fdgs. 16, 17, R. 23, 24).

By Act of June 28, 1938, 52 Stat. 1209, as amended by the Act of July 15, 1941, 55 Stat. 593 (R. 5–10) Congress conferred jurisdiction on the Court of Claims to "hear, determine, and render final judgment on all legal and equitable claims of whatsoever nature which the Ute Indians or any tribe or band or any constitutent (sic) band thereof, may have against the United States * * *." By section 6 of said act of the Court of Claims was authorized to give judgment in favor of petitioners if the court finds that any lands formerly belonging to petitioners have been taken by the United States without compensation therefor. Pursuant to this act petitioners instituted the present action in the court below to recover for an alleged taking by the United States of that area north of the treaty reservation added to the reservation by Executive

Order in 1875 and restored to the public domain in 1882. After considering the evidence introduced, the court below found the facts as above outlined, concluded that petitioners were not entitled to recover, and entered judgment dismissing their petition. On June 3, 1946, petitioners filed their petition in this Court for a writ of certiorari to review the judgment.

ARGUMENT

1. The court below correctly decided that petitioners acquired no compensable interest or title in the lands in suit by reason of their being added to the treaty reservation by the Executive Order of November 22, 1875. This Court squarely held in *Sioux Tribe* v. *United States*, 316 U. S. 317, relied upon by the court below, that an executive order is ineffective to confer a compensable interest in Government-owned land, in the absence of authorization from Congress empowering the President to convey such an interest.

Petitioners (Pet. 13–15) seek to distinguish the decision in the *Sioux* case on the ground that in that case this Court dealt with executive order additions to a treaty reservation which additions were made solely to combat liquor traffic with the Sioux Indians. This is not factually correct. While the liquor problem was a major factor in creating the executive order additions to the treaty reservation, it was not the sole objective. As to

the Standing Rock addition, "a further reason for said request" [by the Commissioner for the creation of the addition] was that "the Agency buildings, as now located at Standing Rock, are outside the reservation as defined by [the Fort Laramie] treaty * * * but are included in the tract proposed to be withdrawn," 316 U. S. at p. 320. An identical situation prevailed in the case at bar; but the case here is stronger, in that the White River Agency was actually within the true treaty reservation and was merely thought to be without it by reason of an erroneous running of the north line of the reservation.

Moreover, this Court's decision in the *Sioux* case demonstrates the invalidity of petitioners' attempted distinction. The basis of that decision is that the power to convey a compensable interest in Government-owned land is vested by the Constitution in Congress alone, and in determining that no such interest is acquired in executive order reservations this Court relied upon the steady and uniform view of Congress and the Executive that "the Indians were not entitled to compensation upon the abolition of an executive order reservation," 316 U. S. at p. 330. This view was ascertained by a consideration of executive and congressional treatment of such executive order reservations generally, without regard to the purposes of their creation, particularly during the period from 1872 to 1886.

2. Petitioners ultimately bottom their claim on the only ground upon which it could possibly be supported, and that is that Congress agreed to compensate them for these lands by the 1880 Act ratifying the agreement of 1880 (Pet, 14.) Petitioners cite no authority for their contention that it was the intent of the parties to the 1868 Treaty to include the lands in suit within the reservation. On the contrary, the record shows that the problem giving rise to creating the addition by executive order was the erroneous exclusion from the true treaty reservation of the White River Valley and Agency, both of which were actually within the reservation defined by the treaty. Moreover, as the court below observed (R. 27), the United States was not committed in the agreement itself to compensate the Indians for ceded lands sold. The Government's agreement in that regard was added by Congress in section 3 of the ratifying act of 1880. In thus undertaking to sell the ceded lands for the Indians' benefit, however, Congress expressly limited the Government's liability to lands to which it acquired title from the Indians by virtue of the agreement. Since the Indians had no title under the executive order, they had none when the agreement was executed, and the Government did not acquire its title to the executive order lands by reason of the agreement; it had never parted with the title to such lands.

Petitioners emphasize the expression "present reservation" in the 1880 agreement and in the preamble to the ratifying act, and argue that the Indians understood the executive order lands to be part of their then reservation (Pet. 6, 7, 10). But assuming that this view is accepted, it does not establish that Congress considered that petitioners had any title in the lands which the Government acquired by the cession, or intended to recognize an obligation with respect thereto. On the contrary, as this Court held in the *Sioux* case, Congress has consistently regarded executive order reservations as vesting no compensable title in the Indians and this was the view taken by the administrative officials in 1882 (cf. R. 28). Thus, petitioners' position that Congress intended to compensate them for lands to which they had no title flies in the face of the express limitations imposed by Congress in assuming liability.

Finally, a reading of the 1880 Act demonstrates that Congress was not granting special favors to the Utes, such as agreeing to pay them for a large area the title to which was already in the United States and title to which the Utes never had. Congress, on the contrary, was bent upon avenging the massacre in 1879 of Meeker, the Indian Agent at White River, and all male employees of the agency, as well as the murder of members of the military. H. Ex. Doc. No. 1, pt. 5,

46th Cong., 2d sess. (1879), pp. 16–19, 82–97. The initial business of the act concerns the apprehension of the guilty parties, and the temper of the Congress to the White River Utes is shown by the provision that their proportion of the money to come to the Indians should not be paid until the guilty ones were apprehended or believed by the President to be dead, and the further provision that their proportion of the money be charged with annuities to be paid to the heirs of the victims of the massacre. 21 Stat. 199. In the light of these circumstances, it is idle to suggest that Congress intended gratuitously to assume the burden petitioners contend for.

Petitioners invoke the doctrine that doubts must be resolved in favor of the Indians (Pet. 11, 12). That principle has no application here. No doubt exists here since the petitioners' claim is barred by the express language used by Congress in fixing the limits of its undertaking under the 1880 Act, which act is the only basis upon which liability could possibly be shown.

CONCLUSION

The questions presented were correctly decided by the court below and there is neither conflict of decision nor question of general importance. It is therefore respectfully submitted that the petition for a writ of certiorari be denied.

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JULY 1946.

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BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 141

THE CONFEDERATED BANDS OF UTE INDIANS,
PETITIONERS

v.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS OF THE UNITED STATES

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinions of the Court of Claims (R. 24–38) are reported at 64 F. Supp. 569.

JURISDICTION

The judgment of the Court of Claims sought to be reviewed was entered on March 4, 1946 (R. 38). The petition for a writ of certiorari was filed on June 3, 1946, and was granted October 14, 1946. The jurisdiction of this Court is invoked under section 3 (b) of the Act of February

13, 1925, as amended by the Act of May 22, 1939, 28 U. S. C. 288 (b).

QUESTIONS PRESENTED

In 1868 the United States entered into a treaty with the Ute Indians whereby the Government established a reservation of about 15 million acres for the Indians, and the latter expressly relinquished all claims to lands not embraced within the reservation. The treaty described the boundaries of the reservation in precise terms. Within the reservation so described lay the White River Valley occupied by the Indians. Subsequently, as a result of a surveyor's error, an erroneous north boundary was established about 16 miles south of the true north boundary of the reservation as described by the treaty, thus ostensibly excluding the White River Valley from the reservation. Under the mistaken impression that the erroneous north boundary correctly marked the north line of the reservation as described in the treaty, President Grant issued an Executive Order on November 22, 1875, setting aside for the use of the Ute Indians a strip of public land bordering not on the erroneous north line but on the true north line of the 1868 treaty reservation.

Under the Act of June 15, 1880, the Utes ceded their reservation to the United States. The Government by section 3 of the Act agreed that "all the lands * * * the title to which is, * * * released and conveyed to the United States" were

to be held as public lands subject to cash entry with the net proceeds to be deposited to the credit of the Indians. Two years later by Act of July 28, 1882, Congress declared that the portion of the "Ute Indian Reservation lately occupied by the Uncompahgre and White River Utes" was public land subject to disposition in accordance with section 3 of the 1880 Act. By Executive Order of August 4, 1882, the President restored to the public domain the land originally withdrawn by the Executive Order of 1875.

The ultimate question is whether the petitioner Indians had an interest in the executive-order lands for which the United States must pay compensation. Subsidiary questions are:

1. Was the President empowered by Congress, either expressly or impliedly, to convey any interest in those lands?

2. If so, did the Executive Order of November 22, 1875 constitute an exercise of such power?

3. If the petitioners did not acquire a compensable interest by the Executive Order of 1875, did Congress, by the Act of June 15, 1880, nevertheless agree to compensate petitioners for the executive-order lands?

4. Are petitioners' claims rendered *res judicata* by the judgment entered in their favor in 1910 in a suit against the United States founded on their claims under the 1880 Act?

STATUTES, TREATIES, AND EXECUTIVE ORDERS INVOLVED

The Jurisdictional Act of June 28, 1938, 52 Stat. 1209, as amended by the Act of July 15, 1941, 55 Stat. 593, appear at R. 5–10; Articles II and III of the Treaty of March 2, 1868, 15 Stat. 619, 2 Kappler 990; the Executive Order of November 22, 1875, 1 Kappler 834; section 3 of the Act of June 15, 1880, 21 Stat. 199, 203–204, 1 Kappler 180, 185; and the Executive Order of August 4, 1882, 1 Kappler 834–835, appear in the Appendix, pp. 52–58.

STATEMENT

This is an action to recover for the alleged taking of about 625,000 acres of land originally withdrawn from the public domain by Executive Order of November 22, 1875, and restored to the public domain by Executive Order of August 4, 1882.

By treaty of March 2, 1868, 15 Stat. 619, 2 Kappler 990, the United States established for the Ute Indians a reservation containing about 15 million acres of land in Colorado. The reservation was particularly described in Article II of the treaty as an area bounded on the east by the 107th degree of west longitude; on the north by a line 15 miles north of the 40th parallel of north latitude; on the west by the western boundary of Colorado; and on the south by the southern boundary of Colorado. By Article III of the

treaty the petitioners relinquished "all claims and rights in and to any portion of the United States or Territories, except such as are embraced in the limits defined" in the reservation established by Article II of the treaty (Fdg. 3, R. 12).

Within the exterior limits of the reservation as described in the treaty, the Government, late in 1869, established the White River Agency at latitude 40°6′ north, and longitude 107°40′ west (Fdg. 5, R. 13). About that time a deputation of Utes visited some miners working along Douglass Creek, Wyoming and in North Park, Colorado, and ordered them away on the mistaken assumption that the miners were trespassing on the 1868 treaty reservation (Fdg. 6, R. 13–14). Douglass Creek is about 35 miles east of the east boundary and about 56 miles north of the north boundary of the 1868 treaty reservation.[1] North Park is a large area in Colorado which at its nearest point is over 30 miles east and about 10 miles north of the true northeast corner of the reservation. (See map attached to this brief.) Apparently the

[1] Moreover, it is in Wyoming above the area claimed by the Utes as part of their original country. This is shown by an earlier treaty with the Tabeguache or Uncompahgre Utes, the northernmost band of the Confederated Bands of Utes. Treaty of October 7, 1863, 13 Stat. 673, 2 Kappler 856, confirmed by Article I of the 1868 treaty. The description in the preamble of that treaty delimiting the land claimed by the Indians shows the Indians did not claim north of the 41st parallel of north latitude, the line between Colorado and Wyoming.

matter was explained to the satisfaction of the Indians (Fdg. 6, R. 13–14).

In July 1874, some six years after the treaty, the Indians remonstrated against the opening of a proposed wagon road through the Bear River Valley, "which valley they claim[ed] as their country." The nearest point of Bear River is about 15 miles north of the true north line of the reservation as defined in the 1868 treaty. (See map.) The Commissioner of Indian Affairs, speaking through the Indian Agent, advised the Indians "that the Bear River Country was not theirs and they had no rights in it whatever." The agent in September 1874 reported "The Indians listened to me respectfully, and dispersed quietly, and I have heard nothing from them in regard to the matter since." From the Indian Agent's report of June 21, 1875, however, it appears the Indians were continuing to assert that Bear River Valley was part of their country (Fdg. 6, R. 14–15).

All this time the northern boundary of the reservation was unsurveyed; and the absence of a settled line probably led to desultory claims such as those with respect to Douglass Creek and North Park. In June 1875 the agent urged that a few of the leading chiefs of the Indians of the White River Agency be permitted to visit Washington to confer with regard to "the northern boundary of this Reservation. * * * I think that such

a visit and conference would be the means of correcting the misunderstanding which now appears to exist among the Indians here in regard to the conditions of the Treaty of 1868 determining the boundaries, northern and eastern of their Reservation, * * *." The agent stated, "If I have talked a minute I have talked a hundred hours on the subject [the Indians' claim to Bear River Valley] and so far as I can learn in the numerous councils which I have had with them most, if not all, the Indians here acknowledge and are living under the Treaty of 1864 and do not recognize the conditions of any other which would [limit(?)] the extent of their territory—at least I can get no concession from them to that effect."[2] (Fdg. 6, R. 15–16.)

Finally in October and November 1875, Deputy Surveyor J. W. Miller under contract with the Government ran a line from east to west across the reservation. The line was not the true north boundary of the reservation (R. 17). Miller did not commence with the northeast corner of the

[2] The "Treaty of 1864" to which the agent referred doubtless was the Treaty of October 7, 1863, 13 Stat. 673, 2 Kappler 856, ratified by the Senate on March 25, 1864. Under Article 2 of that treaty there was reserved to the Tabeguache or Uncompahgre Band (the northernmost band of the Utes) as a hunting reserve land far south of the area in controversy. It did not include Bear River Valley, North Park, Douglass Creek, or even the White River Valley, and by Article 2 the Indians did "cede, convey and relinquish" all their claims outside the hunting reserve.

reservation as described in the 1868 treaty. Instead he started at a point on the east line about 15 to 18 miles south of the northeast corner as defined in the 1868 treaty and ran a line west to the western boundary of Colorado.[3] Miller knew

[3] The reason for the erroneous starting point is as follows: In 1873 part of the east line of the reservation was surveyed by Deputy Surveyor Robert C. Darling, under contract with the United States. Darling's instructions were to survey the east line of the reservation as defined in the treaty with the terminal point "coinciding with the 222d mile from the said Initial point." App., p. 61. (For full text of Darling's instructions see Appendix, pp. 58–63.) Darling commenced on the meridian of the 107° west at the point where it intersected the southern boundary of Colorado. His field notes show he proceeded north and completed the survey at a mile corner which he designated 222. (Vol. 189, Colorado, General Land Office, pp. 1–59.) The certificate of Darling's assistants attached to the field notes recites that they assisted Darling "in surveying the Eastern Boundary of the Ute Indian Reservation of Colorado, from the 37th Paralel [sic] of N. Latitude: North to a point 15 miles North of the 40th Paralel [sic] coresponding [sic] to the 222 mile corner * * *." (For full text see Appendix, pp. 63–64.) Darling's survey was erroneous for the simple reason that his mile corner 222 was 16 miles, 6 chains short of reaching the northeast corner of the reservation as described in the 1868 treaty.

Miller's instructions were to "commence at the 222nd mile post of the East Boundary of said Reserve which is the northeast corner thereof and run due west * * *." App. p. 66 (For full text of Miller's instructions see Appendix, pp. 65–70). In view of Miller's comments at the time he ran the line and the actual location of his line as reported by the Indian agent (Fdg. 7, R. 17), Miller must have started from Darling's mile post 222, since there had been no survey of the eastern line other than Darling's; see also, Sen. Doc. No. 29, 46th Cong., 2nd Sess. (1880), pp. 41, 44). Darling had been instructed to perpetuate his "terminal or 222d mile corner" by establish-

his starting point was wrong and was "from fifteen to eighteen miles south of the position in which it was supposed to be as established by the treaty of 1868." He informed the Indian Agent "that he [Miller] repeatedly so declared it to be to his assistants and members of his party * * *." In the presence of two of the leading chiefs Mr. Miller told the Indian Agent "that he was not running the [northern] boundary line and that their line would be found to run from 15 to 18 miles north of the agency building." The agent reported that "What Mr. Miller said agreed exactly with all that I had previously been able to learn from maps and other sources in the matter, and with what I had previously told the Indians when obliged to say something in reply to their persistent questioning." The agent also reported that Mr. Miller's statement agreed with an observation made the preceding season by a topographer of the United States Geological and Geographical Survey who located the 40th parallel of north latitude as running about a mile and a half north of the agency building, and that this jibed with information the agent had received from his predecessor who in turn had been informed that the northern boundary of the reservation was about 18 miles north of the agency (Fdg. 7, R. 16–18).

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ing a prominent monument properly marked to show it was the northeast corner of the Ute reservation." (See Appendix, p. 62.)

The erroneous Miller line was about 1/8 mile south of the agency building and was south of the White River Valley, which the Utes had occupied for years (Fdg. 7, R. 17, see map attached to brief). Both the agency building and the White River Valley in fact were indisputably within the reservation as defined in the 1868 treaty and the erroneous survey in no sense affected the Indians' title to that portion of their reservation lying between Miller's erroneous line and the true north line. Nevertheless, the running of the erroneous north line, coupled with Miller's statements to the Indians that the line was 15 to 18 miles south of the true north line of the reservation, left the agent "very much embarrassed" (R. 16). In October 1875 after Miller had left, the agent wrote to the Commissioner (Fdg. 7, R. 18):

> It must be seen at once that after all the trouble which I have had in regard to this question within the last twelve months, continually putting off the Indians by informing them that Mr. Miller and authority from Washington would come this season and tell them just where their line was, that I now feel very much embarrassed.
>
> I urge the propriety, the absolute necessity at the earliest practicable date of a new survey.

In November 1875 the Commissioner of Indian affairs had been advised by the attorney for the surveyor Miller that the Miller survey as com-

pleted "develops the fact that the White River and surrounding valleys as well as the Agency buildings and improvements at the White River Agency lie north of the said boundary and consequently are not within the limits of the said Ute Reservation." The Commissioner in his letter of November 19, 1875 (Fdg. 8, R. 19) transmitted to the Secretary of the Interior the information supplied by the surveyor's attorney, and then stated:

> In view of these facts I have the honor to recommend that the President be requested to issue an order withdrawing all that tract of country lying between the north boundary of the Ute Reservation as defined in treaty of March 2, 1868 (Stat. at L., vol. 15, p. 619) and the 1st standard parallel north and setting apart the same as an addition to the present Ute Indian Reservation.

Thus notwithstanding the agent's earlier report that Miller's line was not the true boundary, the Commissioner, in making his recommendation for an Executive Order, made no reference to the agent's report but clearly led the Secretary to believe that Miller's line was the true north line of the Ute Reservation and that the Agency improvements and the White River Valley were outside the north boundary of the reservation. The Secretary passed on to the President a copy of the Commissioner's letter and joined in the

recommendation for an Executive Order (Fdg. 9, R. 19). The President on November 22, 1875, issued an Executive Order withdrawing from public sale the land in controversy and setting it aside for the use of the Utes. (Fdg. 10, R. 19–20.)

That the Government's purpose in issuing the Executive Order was simply to assure to the Utes the continued possession of the White River Valley and the Agency improvements is made clear by the fact that, in advising the agent of the issuance of the order, the Commissioner stated (Fdg. 11, R. 20):

> This action fully protects your Indians in the peaceable possession of their improvements in the White River valley and the Agency buildings, and will enable you to assure the Indians of the exact location of the limits of their reservation, as enlarged.

The Executive Order of 1875 did not describe the land by reference to the erroneous north line fixed by Miller but described the land as "Commencing at the northeast corner of the present Ute Indian Reservation as defined in Treaty of March 2, 1868 * * * thence running north on the 107th degree of longitude to the first standard parallel north; * * *." In other words, the Executive Order described a rectangular tract of land about 9 miles wide and 109 miles long adjoining, not Miller's erroneous north line, but the true north line of the 1868 treaty reservation.

To put it another way, Miller's north line was about 16 miles, 6 chains south of the south line of the executive-order land. (See the map attached to this brief.)

By an agreement dated March 6, 1880, amended and ratified by the Act of June 15, 1880, c. 223, 21 Stat. 199, 1 Kappler 180, the petitioners sold their reservation to the United States, excepting only certain lands for allotment to individual members. Section 3 of the Act, after providing for allotments in severalty, directed that "* * * all the lands not so allotted, the title to which is, by the said agreement of the confederated bands of the Ute Indians, and this acceptance by the United States, released and conveyed to the United States, shall be held and deemed to be public lands of the United States * * *." The Act then specifies that the land be subject to cash entry and that the proceeds after certain deductions be deposited to the credit of the Indians (Fdg. 12, R. 20–21).

Merely to remove doubts entertained by settlers as to their right to make entry and obtain patents, Congress by the Act of July 28, 1882, c. 357, 22 Stat. 178, 1 Kappler 205, declared the lands formerly occupied by the Uncompahgre and White River Utes to be public lands subject to disposal in accordance with section 3 of the 1880 Act, (Fdg. 13, R. 22). A few days later on August 4, 1882, the President issued an Executive

Order restoring "to the public domain" the land set aside for the use of the petitioners by the Executive Order of November 22, 1875 (Fdg. 15, R. 23). Thereafter the executive-order lands were opened to entry as public lands and the proceeds of the sales were deposited to the credit of the Government (Fdg. 16, R. 23).

Following the Act of 1880 a large amount of the acreage embraced within the former reservation as described in the 1868 treaty was sold in accordance with section 3 of the 1880 Act. The United States also reserved substantial areas for public purposes. To permit an accounting for the disposal of these lands formerly a part of the 1868 treaty reservation, Congress by the Act of March 3, 1909, c. 263, 35 Stat. 781, 788–789, conferred power on the Court of Claims to hear, determine, and render final judgment on "the claims and rights" of petitioners under the agreement ratified by the 1880 Act, "including the value of all lands ceded by the said Indians [petitioners] which have been set apart and reserved from the public lands as public reservations * * *." Pursuant to that jurisdictional act the petitioners brought suit in the Court of Claims seeking recovery for the failure of the United States to dispose of the lands ceded by the agreement of 1880, for an accounting for lands sold, and for compensation for the lands reserved by the United States for public purposes. The petitioners re-

covered a judgment for the proceeds of the cash sales of land, plus the value of lands reserved for public purposes less offsets and deductions. *The Ute Indians* v. *United States*, 45 C. Cls. 440, 46 C. Cls. 225 (1910).[4] None of the lands so compensated for lay north of the true boundary of the reservation as fixed by the 1868 treaty and accordingly did not embrace the executive-order lands. (Fdg. 17, R. 23–24).

By Act of June 28, 1938, 52 Stat. 1209, as amended by the Act of July 15, 1941, 55 Stat. 593 (R. 5–10) Congress conferred jurisdiction on the Court of Claims "to hear, determine, and render final judgment on all legal and equitable claims of whatsoever nature which the Ute Indians or any tribe or band or any constitutent (sic) band thereof, may have against the United States * * *" (R. 5). By section 6 of that Act the Court of Claims was authorized to give judgment in favor of petitioners if the court found that any lands formerly belonging to petitioners had been taken by the United States without compensation therefor. Pursuant to this Act petitioners instituted the present action in the court below to recover for an alleged taking by the United States of the land embraced in the Executive Order of 1875 and

[4] On October 15, 1945, a supplemental action was instituted in the court below by the petitioners seeking an accounting from July 1, 1910, the termination date of the prior accounting, down to June 28, 1938. *The Confederated Bands of Ute Indians* v. *The United States Of America*, No. 46640.

restored to the public domain by the Executive Order of 1882. The court below found the facts, concluded that petitioners were not entitled to recover, and entered judgment dismissing their petition (R. 11–24, 38). On June 3, 1946, petitioners filed their petition in this Court for a writ of certiorari to review the judgment. Certiorari was granted on October 14, 1946 (R. 38).

SUMMARY OF ARGUMENT

I

A. This Court's decision in *Sioux Tribe* v. *United States*, 316 U. S. 317, is conclusive that the President had no power to convey to petitioners a compensable interest in the land described in the Executive Order of 1875. The Treaty of 1868 did not delegate to the President any power to enlarge the reservation. Petitioners offer no controlling distinction of the *Sioux* decision nor do their arguments establish that Congress authorized the President to convey the executive-order land to petitioners.

B. Petitioners' contention that the Executive Order of 1875 was intended to vest in them a compensable interest to these lands is immaterial because such intention, even if it existed, could not remedy the lack of Congressional authorization. Moreover, the findings and the evidence show that both before and after the issuance of the Executive Order there was no such under-

standing on the part either of the Government officials or of the Indians. The record reveals a uniform understanding by the Government officials that the 1868 treaty specifically delineated the area reserved to petitioners; that the Indians knew it; and that the issuance of the Executive Order of 1875 was intended only to cover the White River Valley lands, which already lay within the bounds of the 1868 treaty reservation, and to meet a situation resulting from an erroneous survey of the north treaty-boundary, which survey as drawn, would have deprived the Indians of a portion of the treaty reservation.

II

Congress, by enactment of the Act of June 15, 1880, 21 Stat. 199, did not ratify the Executive Order of 1875, nor did it thereby agree to compensate the petitioners for the executive-order lands. The Act by its express terms limited the Government's promise to compensate petitioners for lands "title to which is, by the said agreement * * * released and conveyed to the United States." Since petitioners had no title to the executive-order lands, those lands are excluded by the plain terms of the Act. The legislative history of the 1880 Act shows that the executive-order lands were never mentioned or considered by Congress in enacting the legislation. No basis exists for an implication that Congress could have

intended to compensate petitioners therefor. Far from intending to bestow a gratuity upon petitioners, Congress, as appears both from the other provisions of the Act and from its legislative history, was actuated by hostility towards petitioners resulting from the White River Massacre in 1879, for which Congress held one of petitioner bands responsible. The view of the officers charged with the administration of the Acts of 1880 and 1882 was that the lands described in the Executive Order of 1875 were not embraced in the 1880 Act.

Petitioners' principal contention in this Court is that they understood they were to be compensated for the executive-order lands. However, such a contention is without factual foundation; the record contains neither evidence nor findings to support it. Moreover, such an understanding—even if it existed—could not alone justify imposition of liability since there is no showing that Congress knew of such understanding and intended to give effect to it.

III

In 1910 petitioners recovered all sums due them up to that time founded upon the 1880 agreement. *Ute Indians* v. *United States*, 45 C. Cls. 440; 46 C. Cls. 225. The judgment in that case is conclusive of all claims of petitioners under the 1880 Act, and is *res judicata* of the present claim.

ARGUMENT

I

PETITIONERS DID NOT ACQUIRE ANY COMPENSABLE INTEREST IN THESE LANDS BY VIRTUE OF THE EXECUTIVE ORDER OF 1875

A. *The President was without power to convey a compensable interest to petitioners.*—To recover, petitioners must establish that they were the owners of such an interest in the 1875 executive-order lands as to require the payment of just compensation to them when the lands were restored to the public domain by the subsequent Executive Order of 1882. In *Sioux Tribe* v. *United States*, 316 U. S. 317, this Court unanimously held that, without express or implied authority from Congress, the President could not by executive Order convey to an Indian tribe an interest in public lands for which the United States was obliged to compensate the tribe when the lands were restored by a subsequent executive order.[2]

[2] The executive orders in the *Sioux* case withdrew public lands from sale and settlement and set them apart for the use of the Sioux Indians as additions to their permanent treaty reservation. The orders provided (p. 321) that the described territory "be, and the same hereby is, withdrawn from sale and set apart for the use of the several tribes of Sioux Indians as an addition to their present reservation." The Executive Order here used precisely the same language (R. 19-20). Note the difference in language in the final lines of an Executive Order of withdrawal issued for the

Petitioners seek to avoid the effect of the *Sioux* decision by the contention that the Executive Order of 1875 was intended to settle a dispute as to the location of the north line of the reservation fixed by the 1868 treaty (Br. 28).[5] But Article II of the treaty precisely defined the exterior bounds of the reservation, and it explicitly described the north boundary as running due west from a point on the 107th meridian of longitude 15 miles north of the 40th parallel of north latitude to the Colorado border. In Article III of the treaty the Indians expressly relinquished all claim to any land other than was "embraced in the limits defined in the preceding article." (Appendix, p. 55.) This language clearly shows the intention of the Indians and of the Government, contemporaneous with the treaty, that the reservation was limited to the lands south of the north line described in the treaty as it should be later established by survey. Of course, the strip later added by the 1875 Executive Order was north of the north line defined in the treaty. But no authorization to the President to convey additional land is contained in the treaty. Thus, as in the *Sioux* case, Congress did not delegate to the President authority to convey to the Indians a

purpose of settling a boundary dispute with these petitioners (R. 37–38; Rept. Comm'r. Ind. Affairs 1877, p. 240).

[5] We shall show later that this contention is based on assertion, not fact (*infra*, pp. 24–34).

compensable interest in any portion of the public domain.[7]

Petitioners strain to distinguish the *Sioux* case. Their attempted distinctions, however, do not establish any congressional authorization empowering the President to convey public lands. Petitioners assert that the purpose of the Executive Order in the *Sioux* case (suppression of liquor traffic) was different from the purpose of the Executive Order in this case (to protect Indians in the occupation of the White River Valley) (Br. 27–29). But manifestly, whether the President was empowered to vest the Indians with the ownership of public land does not depend on the purpose the executive order was intended to accomplish. In both instances the orders were for the benefit of the Indians. In fact, all executive-order reservations were established for the benefit of the Indians. For example, the 1872 Annual Report of the Commissioner of Indian Affairs referred to some 40,000 Indians who had no reservation secured by treaty, but were by Executive Order placed on some 15 reservations set apart from the public domain. The Annual Report stated (p. 84) "The Indians thus located, however, have, in the nature of the case, no assur-

[7] This case is not concerned with any question of "original Indian title." There is not present here the issue involved in the case *United States* v. *Alcea Band of Tillamooks*, —— U. S. ——, October Term, 1946, No. 26 decided November 25, 1946.

ance for their occupation of these lands beyond the pleasure of the Executive." Moreover, petitioners' assertion (Br. 28) that the Executive Orders in the *Sioux* case were merely for suppression of the liquor traffic and in no other sense for the benefit of the Indians is not factually correct. While the liquor problem was a major factor leading to the issuance of the Executive Orders, it was not the sole objective. As to the Standing Rock addition, "a further reason for said request" [by the Commissioner for the Executive Order] was that "the Agency buildings, as now located at Standing Rock, are outside the reservation as defined by [the Fort Laramie] treaty * * * but are included in the tract proposed to be withdrawn", 316 U. S. at p. 320.

Petitioners apparently have abandoned the contention made in their petition for certiorari (Pet. 15) that prior to the *Sioux* decision it had been generally understood that the titles of Indian tribes under executive-order reservations established for their benefit were unassailable. Instead they now simply argue that in 1875–1880 there was no decision such as that in the *Sioux* case (Br. 26) and that (Br. 16–17, fn. 4) the Indians at that time "had no power to divine that some 62 years later a court would draw some esoteric distinction between the quality of ownership in that part of their land described in the treaty and that part described in the Executive Order.

(See *Sioux Tribe of Indians* v. *United States*, 316 U. S. 317.)".

It is true there was no decision holding that the Indians acquired no interest in executive-order lands compensable as against the United States. But, as this Court took care to point out in the *Sioux* case, both Congress and the Executive understood during the period from 1872–1880 when the great number of executive-order reservations were established, that the Executive Orders did not vest the Indians with title as against the United States. *Sioux Tribe* v. *United States*, 316 U. S. 317, 327–328; see Government's Brief therein pp. 23–25 for a detailed statement of the materials showing such understanding.*

Nor is there any substance in petitioners' argument (Br. 28) that here the Government honored the stated purpose of the 1875 Executive Order by excluding settlers, while in the *Sioux* case settlers were not disturbed. The purpose of the Sioux Executive Orders, suppression of liquor traffic, did not require the exclusion of bona fide settlers on the land prior to the issuance of Executive Orders. On the other hand, the purpose motivating the issuance of the Executive Order of 1875 was to bar settlers from the White River Valley. The difference in purposes cannot create in the Presi-

* It is noteworthy that the Executive Orders in the *Sioux* case were issued at practically the same time (1875 and 1876) as was the order in this case (1875).

dent a power to convey a compensable interest in the public domain. Under the Constitution that power resides in Congress alone. *Sioux Tribe* v. *United States*, 316 U. S. 317, 324.

B. *Even if the President had the power to convey public lands, the Executive Order of 1875 did not constitute an exercise of such a power.*—Petitioners assert that at the time of the agreement of 1880 the Indians understood they owned the executive-order lands (Br. 15). However, that assertion is utterly without support in the record. Moreover, whatever the Indians' understanding as to ownership may have been, it does not supply Congressional authority empowering the President to convey public lands.

The record clearly shows that the Indians never were given to understand that they owned the executive-order lands or that the administrative officers of the Government intended the Executive Order to vest title in the petitioners. In 1869 some Indians mistakenly thought miners working on Douglass Creek, Wyoming, and in North Park, Colorado, were on the reservation, although in fact those places were far north and east of the reservation limits (*supra*, pp. 5–6; see map attached to brief). The Commissioner reported that "the matter being explained to the Indians, no further trouble is apprehended". Of the same incident, the Superintendent of Indian Affairs reported that "In this assertion the Indians were mistaken," and that the lands "are not within fifty

miles of the reservation" (R. 13–14). Similarly, in 1874 some Indians asserted a claim to the Bear River Valley, but were informed explicitly by the Commissioner "that the Bear River country was not theirs, and that they had no rights in it whatever" (R. 15). This unfounded claim to Bear River Valley was reported by the Indian Agent to result, not from the Indians' understanding of the 1868 treaty, but from the fact that the Indians "are living under the Treaty of 1864 and do not recognize the conditions of any other which would [limit(?)] the extent of their territory" (R. 15–16). (See fn. *supra*, p. 7.)

Despite the Commissioner's express rejection of the Indians' claim to the Bear River country, the principal Indians of the White River Agency, apparently under the impression that their rights were fixed, not by the 1868 treaty but by the 1864 treaty, requested through the agent that a delegation be permitted to visit Washington. The agent favored the request on the ground that a conference in Washington "would be the means of correcting the misunderstanding which now appears to exist among the Indians", and "would induce them to be more quiet and contented in the face of the present and proposed immigration of white settlers to the Bear River Valley" (R. 15). Thus, it is clear that the Indians were simply mistaken in their claim to Bear River Valley and that this mistake resulted, not from any dispute over the meaning of the 1868 treaty, but because so far as

the Indians were concerned they were "living under the Treaty of 1864". (See fn. 2, *supra*, p. 7).

All these places, Douglass Creek, North Park and Bear River Valley, lie wholly outside both the 1868 treaty reservation and the executive-order lands in controversy. It is clear that the officers of the Government, far from encouraging the Indians in their unfounded claims, consistently and explicitly advised the Indians that those places were outside of their reservation.

An entirely different situation prevailed with respect to White River Valley. That valley lay wholly within the 1868 treaty reservation. No part of it falls within the executive-order lands (See map attached to brief). It belonged to the Indians and the Indians' ownership of that valley was confirmed to them by the 1868 treaty. Furthermore, since the Act of 1880, compensation to petitioners has been allowed, or provision for compensation has been made, with respect to every acre in the 1868 treaty reservation, including the White River Valley.*

* *The Ute Indians* v. *United States*, 45 C. Cls. 440; 46 C. Cls. 225 (accounting for lands disposed of up to July 1, 1910); *The Confederated Bands of Ute Indians* v. *United States*, No. 46640 pending in Court of Claims (accounting from July 1, 1910, to June 28, 1938); *Confederated Bands of Ute Indians* v. *United States*, 100 C. Cls. 413 (1943) (interlocutory judgment holding the United States liable for the value as of June 28, 1938, of all lands in the 1868 treaty reservation, not covered by the two accounting cases cited above).

Significantly, no difficulty arose with respect to the White River Valley lands until after the erroneous Miller survey in October and November 1875. (See Statement, *supra*, pp. 7–12). When Miller reached the proximity of the agency, it was apparent that the agency improvements and the White River Valley lay north of the line Miller was running. Immediately and for the first time the Indians became uneasy since they feared that the agency improvements and the White River Valley, which they had "occupied as a home for years" were to be taken from them (R. 17). In contrast to the responsible Government officers' flat rejection of the Indians' earlier claims to Douglass Creek, North Park and Bear River Valley, the right of the Indians to White River Valley was instantly recognized. Miller announced on the ground to the agent and two leading Chiefs "that he was not running the [northern] boundary line and that their [the Ute] line would be found to run from 15 to 18 miles north of the agency building" (R. 17). And in reporting the incident to the Commissioner the agent pointed out that he and his predecessors had informed the Indians that the White River Valley "was still theirs, and would not be taken from them" (R. 17).

The Indians' right to the White River Valley was promptly recognized in Washington by the Commissioner of Indian Affairs, at whose instance the Executive Order of 1875 was issued.

In advising the agent of the issuance of the Executive Order the Commissioner stated: "This action fully protects your Indians in the peaceable possession of their improvements in the White River valley and the Agency buildings, and will enable you to assure the Indians of the exact location of the limits of their reservation as enlarged" (R. 20).

This history clearly demonstrates that at the time the Executive Order of 1875 was issued the Indians did not understand they owned the lands described in the Executive Order and there is nothing in the record showing that they ever were informed that they owned those lands. What the Indians did understand, and correctly, is that they owned the White River Valley.[10]

What problem did the President and the Secretary of the Interior intend to remedy by issuing the Executive Order of 1875? The only problem they considered was the one presented to them by the Commissioner. While the Commissioner's objective in requesting the Executive Order was to protect the Indians in their possession of White River Valley (See Statement, *supra*, p. 12), he made no reference to the

[10] It is significant that petitioners nowhere clearly explain that the Executive Order of 1875 in fact covered lands wholly north of the White River Valley. Their brief paints the picture (Br. 6) that the Executive Order embraced the White River Valley. Furthermore, there is no evidence that petitioners ever settled on or in any way improved the executive-order lands.

fact that Miller's survey was erroneous, but on the contrary gave the Secretary the unmistakable impression that the agency improvements and the White River Valley lay north of the true north treaty-boundary. It was with this understanding of the problem that the Secretary recommended and the President issued the Executive Order of 1875. This history clearly demonstrates that the Secretary and the President in issuing the Executive Order believed that the executive-order lands embraced the White River Valley and the agency improvements. Thus, we have a situation where both the Indians and the Executive thought that the lands described in the Executive Order embraced the White River Valley when in fact they did not—a clear case of mutual mistake. Under these circumstances, even assuming the President had the power to convey these lands, there is absolutely no basis for attributing to the President an intention to transfer title to the lands described in the Executive Order, nor is there any basis for assuming (as petitioners do) that the Indians understood they were receiving title to the executive-order lands. It was the understanding of all parties that the Executive Order dealt with the White River Valley lands.

Even in the absence of mutual mistake, there is another reason why the Executive Order of 1875 should not be construed as vesting the Utes with a compensable interest in the lands. That

order was issued at about the same time and is in terms identical with the orders passed upon in *Sioux Tribe* v. *United States*, 316 U. S. 317, 320. As this Court there observed (p. 327), it was the consistent administrative understanding that such orders (including those setting aside areas for the use and occupancy of Indians as distinguished from the liquor-suppression purposes for which the Sioux orders were issued) conferred on the Indians rights "different from and less than their rights and interests in treaty or statute reservations." This Court relied on administrative expressions to the effect that the Indians had "no assurance for their occupation of these [Executive Order] lands beyond the pleasure of the Executive," and that the Indians "are mere tenants at will, and possess no permanent rights to the lands upon which they are temporarily permitted to remain." There is nothing to show that in issuing the Executive Order of 1875 for the Utes the President departed from the uniform administrative understanding which prevailed at the time the order was issued. It follows that even if it be assumed that the President was empowered to transfer title by Executive Order, there was no intention to exercise it.

The Executive Order of 1875 did not achieve the intended objective of protecting the possession of the Indians in the White River Valley. Whites continued to intrude upon the valley lands and

the reason for the intrusion was that the whites regarded the erroneous Miller line as fixing the northernmost limits of the Ute reservation. Consequently the problem resulting from the erroneous Miller line again confronted the government officers in 1877. The ensuing correspondence[1] makes evident that those officers recognized that the Miller survey was in fact erroneous and that there could be no real and permanent solution of the problem without a correct survey of the north treaty-boundary.

On May 7, 1877, the agent urged upon the Commissioner that the Miller mistake should be "officially rectified by authorities in the Land Office; that correct maps indicating the true position of the northern boundary of the Ute Reserve * * *" should be circulated widely. The agent called attention to the boundary as being plainly defined *in the treaty* as fifteen miles north of the fortieth parallel of latitude (R. 34). The Commissioner replied on May 23, 1877, by sending the agent a copy of the Executive Order of 1875 and commenting that, regardless of the accuracy of the Miller line, the Executive Order operated to exclude intruders from lands south of the north line of the executive-order lands

[1] This correspondence appears in Senate Executive Document No. 29, pp. 41–45, January 7, 1880, 46th Congress, 2d session, and is quoted in Judge Littleton's concurring opinion at R. 31–35.

(R. 32). The agent, obviously irritated by the Commissioner's seeming miscomprehension of the situation, explained in his letter of June 11, 1877, that the problem required action to prevent trespass, not to remove trespassers after they settled (Sen. Ex. Doc. No. 29, *supra*, p. 42). He recited that "the white people in the neighborhood of the northern portion of the reservation" were preparing to move into the White River Valley, that "Efforts are being made to raise colonies to settle in the White River Valley," that sixty families were reported *en route*, and that others were hunting and prospecting for gold. He again put the blame on the mistakes of the Miller survey and again vigorously urged the Indian Office to publish widely the "true boundaries of this reservation" (R. 33–34).

The agent's letter finally moved the Commissioner to bring the matter before the Secretary of the Interior by letter of July 5, 1877, calling attention to the error in the Miller survey and to the fact that the Miller line did not conform to the treaty boundary. For the first time then, the Secretary was advised that the Miller line was erroneous and was "south of the fortieth parallel of north latitude, instead of fifteen miles north thereof, as provided by treaty of March 2, 1868 * * * ". In this same letter the Commissioner characterized the intrusion of whites

upon the White River Valley as "a flagrant violation of their [Utes] clear treaty rights". The Commissioner advised the Secretary that following the Miller survey the whites began to invade the White River Valley under color of that survey and recommended "a resurvey in lieu of that executed by Miller, so as to conform to the boundaries defined in the treaty." He also recommended that a military force be sent to the White River Valley "to insure the faithful observance of the treaty stipulations with the Utes" (R. 34–35). Throughout their correspondence the agent and the commissioner placed emphasis on the treaty boundary and on the urgency of a correct survey of that boundary. This confirms the view that the Executive Order of 1875 was not intended as an irrevocable revision of the north line defined in the treaty.

The events subsequent to 1875 reflected by this correspondence confirm the 1875 understanding of both the Indians and the Government that the Executive Order of that year was intended to deal only with the lands of the White River Valley. From this it follows that there could have been no understanding or intention on the part of the Government to convey to the Indians the lands described in the Executive Order of 1875.

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[11] With the enactment of the 1880 Act the need for a new survey of the north treaty-boundary was obviated.

II

THE ACT OF 1880 DID NOT COMMIT THE UNITED STATES TO COMPENSATE PETITIONERS FOR THE EXECUTIVE ORDER LANDS

Petitioners undertake to supply in this case what was lacking in the *Sioux* case, namely, a Congressional recognition of a compensable interest in the executive-order lands. For this they rely on the subsequent Act of June 15, 1880, 21 Stat. 199, as conveying the executive-order lands to them (Br. 23). This position is without support.

The terms of the 1880 Act, its legislative history and its administrative construction show no Congressional intent to compensate petitioners for the lands described in the Executive Order of 1875.—The Act contains no language which expresses such an intent. The purpose of that Act was not to vest title of any nature in any lands in petitioners, but to convey to the United States lands owned by the Utes in Colorado. The undertaking of the United States to compensate petitioners is embodied in section 3 of the Act (Appendix, pp. 56–57). After providing that allotments in severalty be made, the Act recites that "all the lands not so allotted, the title to which is, by the said agreement of the confederated bands of the Ute Indians, and this acceptance by the United States, released and conveyed to the United States, shall be held and deemed to

be public lands of the United States" and provides for their sale for the account of petitioners. Words could hardly be clearer. Since petitioners had no title to the lands in controversy under the Executive Order of 1875, and since the 1880 Act contains no language vesting petitioners with title, Congress could not have had those lands in mind when it referred to land "the title to which is * * * released and conveyed to the United States."

Petitioners assert that the Indians did not understand the meaning of the word "title" used in the 1880 Act (Br. 18–21). First, there is nothing in this record showing that the Indians did lack understanding. Counsel's unsupported assertions cannot supply this deficiency. Secondly, to accept petitioners' argument would mean that whenever the word "title" is used in an act of Congress or treaty relating to Indians, it must be unilaterally construed as counsel for the Indians afterwards say they understood or misunderstood it, regardless of the intention of the United States. This has never been the rule, and a court applying such a rule would not be construing legislation but would be merely ascertaining the fact of what the Indians thought the law meant (pp. 45–48 *infra*). Thirdly, the word "title" had been used in at least three treaties with the Utes prior to the Act of 1880 (Treaty of October 7, 1863, Art. 2, 13 Stat. 673; Treaty of March 2, 1868, Art. VII, 15 Stat. 619; Act

of April 29, 1874, Art. I, 18 Stat. 36). Many of the same Indians who signed the earlier treaties on behalf of the Utes signed the agreement ratified by the Act of 1880 and presumably had engaged in the negotiations leading up to those treaties. Chief Ouray, recognized as head man of all the Ute Bands, signed all three treaties as well as the agreement ratified by the 1880 Act. Ouray could speak Spanish (the language in which negotiations generally were carried on) and was the official interpreter when the 1868 treaty was made. Our Indian Wards, George W. Manypenny (1880) pp. 406, 416. Fourthly, in 1909, at the time petitioners asserted their claims under the 1880 Act in the Court of Claims (45 C. Cls. 440), the Utes were 35 years nearer the 1880 agreement and many of them who were mature men in 1880 were presumably still available. Yet no claim was then made that the word "title" in the 1880 Act included the executive-order land. On the contrary, at that time petitioners relied solely on the 1868 treaty and affirmatively requested the court below to find that "No lands have ever been ceded to plaintiffs by the United States outside of their said reservation as defined in the treaty proclaimed in 1868 (15 Stat. at Large, p. 619 * * *);" (*The Ute Indians* v. *United States*, 45 C. Cls. 440 (1910), R. 391; 735).

The history of the 1880 Act.—An examination of the legislative history of the 1880 Act removes

all doubt as to whether Congress gratuitously was vesting the Utes with title to approximately 600,000 acres of land in addition to roughly the twelve million acres already held by the Utes, and was at the same time purchasing these 600,000 acres from the Indians. The Congress which enacted the 1880 Act was in no magnanimous mood. It had been aroused by the outbreak on the Ute Reservation on September 29, 1879, during which some of the White River Utes massacred Meeker, the Indian Agent at White River, all the agency's male employees and others, and ambushed a small detachment of military, killing a number of soldiers. Ex. Doc. No. 1, pt. 5, 47th Cong., 2d Sess. (1879), pp. 16–19, 82–97. It was that massacre which prompted an outraged Congress to introduce a number of bills and resolutions aimed at punishing the guilty Indians, extinguishing the title to all Ute holdings, and removing the Utes from Colorado.[13] It is unlikely that such a Congress was seeking to enlarge the holdings of the Utes or to bestow special favors upon them such as vesting them with title to

[13] S. 772 and S. Res. 51, both introduced December 8, 1879, 10 Cong. Rec., pt. 1, p. 30 (1879). S. Res. 51 was passed by the Senate on December 11, 1879, 10 Cong. Rec., p. 77. H. Res. 142 introduced December 9, 1879, 10 Cong. Rec., p. 44. H. R. 2420 introduced December 2, 1879, 10 Cong. Rec., p. 17. H. Res. 154 introduced December 15, 1879, 10 Cong. Rec., p. 113. H. R. 5092 introduced March 12, 1880, 10 Cong. Rec., pt. 2, p. 1538 (1880).

extensive lands to which they had no legal claims."[14] It was seeking, first, vindication for the Meeker massacre, and second, removal of the Utes and expeditious elimination of their holdings in Colorado.

The first business of the Act (sec. 1) concerns the apprehension of the Indians implicated in the Meeker and White River murders. The temper of Congress toward the White River Utes, whom it considered primarily responsible for the massacre, is evidenced by the provision that the proportion of the money coming to those Indians was not to be paid until the guilty parties had surrendered or had been apprehended, or until the President was satisfied they were no longer living or were beyond the limits of the United States. Congress further displayed its animus toward the White River Utes by charging their portion of the moneys with the annuities allowed to the heirs of those murdered in the massacre. Yet petitioners undertake to persuade the Court that in this same act, Congress, as a matter of benevolence, bestowed upon the Utes title to 600,000 acres of public land and agreed to account to them for the land.

There is no basis whatever in the legislative history for the conclusion that Congress intended

[14] Petitioners' argument (Br. 30–35) that the Utes were without blame in the Meeker massacre, even if true, is irrelevant. Congress considered them responsible and the important thing is the frame of mind of the Congress which enacted the 1880 Act.

in the 1880 Act to deal with the executive-order land. The proposed legislation was considered by the Committees on Indian Affairs of both the Senate and the House; it was debated for seven days on the floor of the Senate and for one day in the House; it was then considered by a joint conference committee.[15] Nowhere in the legislative annals is there a single word in any way indicative of an intent to vest the Utes with a compensable interest in the lands covered by the Executive Order of 1875. That order was at no time mentioned, let alone considered by Congress, although there was discussion of items and matters of far less consequence.

This legislative history does not comport with Judge Whitaker's view (R. 28) that Congress had in mind the executive-order land when it used the language contained in section 3 of the 1880 Act. The history shows those lands were never even mentioned. However, if Congress did, as Judge Whitaker thought, have these lands in mind, then certainly the language employed in section 3 cannot be reconciled with an undertaking on the part of Congress to purchase them.

Petitioners point to the phraseology of the first section of the agreement incorporated into the 1880 Act (Br. 23). That section recites that the

[15] 10 Cong. Rec., pt. 3, pp. 2027–2030, 2058–2067, 2121–2130, 2152–2164, 2189–2202, 2221–2228, 2249–2252, 2253–2268, 2309–2320 (1880), idem., pt. 5, pp. 4251–4263, 4461–4465, 4487 (1880); H. Rep. No. 1401, 46th Cong., 2d sess. (1880).

chiefs and headmen agree to use their best endeavors to procure the consent of their people to the cession of all the territory of the "present Ute Reservation". Petitioners rely heavily on the word "present" as including the 1875 executive-order lands. There is nothing to indicate that Congress understood that expression as including the executive-order lands. And petitioners have failed to adduce any evidence that the Indians so understood it. A more natural inference is that the word was used to describe the tribal holdings in 1880 as distinguished from the holdings in 1868, bearing in mind that in 1873 the Indians had ceded some three million acres of the 1868 treaty reservation. Agreement of September 13, 1873, ratified by the Act of April 29, 1874, 18 Stat. 36, 1 Kappler 151, Fdg. 4, R. 12. In any event, in the teeth of the explicit language of section 3 of the Act and in the absence of any affirmative showing in the history of the legislation that Congress had the executive-order lands in mind, the mere use of the phrase "present Ute Reservation" is not strong enough to warrant a holding that Congress understood the term as including executive-order lands.

In view of the circumstances which provoked the passage of the 1880 Act and the general temper of the Congress which enacted it, if it had been intended by that Act to vest the Utes with 600,000 acres of public lands, surely Congress

would have expressed that intent in clear and apt words. The absence of such language is fatal to petitioners' case. Certainly, nothing in the purpose, language, or history of the 1880 Act supports the argument that Congress can be charged with an intent to transfer title to the executive-order lands by mere implication founded on the labored construction petitioners urge this Court to place upon the phrase "present reservation".

The administrative construction.—As the court below pointed out (R. 28), the administrative officers charged with carrying out the 1880 Act did not construe it to mean that the lands described in the Executive Order of 1875 were to be sold for the account of the Indians. Implementation of the 1880 Act was provided for in the Act of July 28, 1882, c. 357, 22 Stat. 178. That Act stated that petitioners' reservation "be, and the same is hereby, declared to be public land of the United States, and subject to disposal from and after the passage of this Act, in accordance with the provisions and under the restrictions and limitations of" the 1880 Act (R. 22). A few days later, on August 4, 1882, the President by Executive Order directed that the land "withdrawn from sale and set apart for the use of the several tribes of Ute Indians by Executive Order dated November 22, 1875, be, and the same hereby is restored to the public domain" (Fdg. 15, R. 23).

This was the customary phraseology employed

in Executive Orders restoring to the public domain lands previously set aside by Executive Order for Indian use. See *Sioux Tribe* v. *United States*, 316 U. S. 317. As this Court there stated (p. 330): "It was a common practice, during the period in which reservations were created by Executive Order, for the President simply to terminate the existence of a reservation by cancelling or revoking the order establishing it". The fact that the same practice was followed in this case is an unequivocal expression of the administrative understanding that these lands were no different than the hundreds of other executive-order reservations. If the administrative officials had entertained the view that the 1875 executive-order lands were within the 1880 cession, no Executive Order of restoration would have been necessary since the Act of July 28, 1882, had already incorporated into the public domain all lands ceded to the United States by the Indians in the 1880 Act. The issuance of the Executive Order of 1882 clearly shows the administrative view that the 1875 executive-order lands were not covered by the 1880 Act since the executive-order lands were simply "restored to the public domain" while the lands ceded by petitioners were by statute (1882 Act) to be subject to disposal in accordance with the 1880 Act which embodied restrictions and limitations on sale not applicable to public domain lands.

Petitioners' contentions, based upon the asserted understanding of the parties, are without merit.—Counsel for petitioners state that the Indians understood both that they owned the executive-order lands and that by the phrase "present reservation" in the 1880 agreement they were ceding them to the United States, and further, that the United States knew of the Indians' understanding (Br. 16–17; 23). These statements are nothing more than unsupported assertions. The facts are to the contrary (See *supra*, pp. 7–13; 26–33). No evidence was adduced to support these assertions. Counsel rely solely on statements in the opinion of Judge Whitaker in the court below. First, they quote the excerpt that the Indians "in all probability believed that they [the executive-order lands] were as much a part of their reservation as were the lands set aside by the Treaty of March 2, 1868.". And they stress the assertion that "they [the Indians] no doubt believed that they were ceding to the United States these lands as well as others" (R. 26, Br. 16).

Both quotations are mere speculations on the part of Judge Whitaker. The record contains no proof to support his statements, and there is not and cannot be a finding that the Indians had such an understanding. "The deficiency in findings cannot be rectified by statements in the opinion." *United States* v. *Causby*, — U. S. — October Term, 1945, No. 630.

As already shown, neither the Indians nor the Government had in mind the lands actually covered by the Executive Order of 1875. Both understood that order to embrace the White River Valley lands. In view of this mutually mistaken comprehension of the situation neither the Indians nor the Government could have understood the Executive Order to pass an interest in any lands other than those in the White River Valley. Moreover, the fact that petitioners made no claim for these lands in 1910, when they sued in the Court of Claims under a jurisdictional act authorizing them to litigate their "claims and rights" under the 1880 Act, is itself evidence that the Indians as of that earlier date did not regard the executive-order lands as within the 1880 cession (Fdg. 17, R. 23, and see pp. 48–51 *infra*).

Petitioners also quote (Br. 17) Judge Whitaker's statement that "Congress knew they [petitioners] probably considered these executive-order lands a part of their 'present reservation.'" Here again there is neither evidence nor a finding that Congress had such knowledge. Obviously Judge Whitaker's expression is simply his speculation as to the reason Congress used the language it did. But the legislative history of the 1880 Act as hereinbefore shown (pp. 34–39 *supra*) demonstrates that the matter of the executive-order lands was never considered by Congress.

Petitioners assert that in construing statutes or treaties dealing with Indians, the under-

standing of the Indians is the controlling factor (Br. 17).[16] There is no proof that either the Indians or the United States understood that the executive-order lands were to be embraced in the 1880 act. Petitioners' rule of construction would mean that the asserted understanding of the Indians must prevail, regardless of the terms of the statute or the intention of the United States. That contention was rejected in *Shoshone Indians* v. *United States*, 324 U. S. 335, where this Court considered the same line of cases presently relied upon by petitioners (Br. 17–18). It was there stated (p. 353):

> Petitioners suggest that in the construction of Indian treaties we, as a self-respecting nation, hesitate to construe language, which is selected by us as guardian of the Indians, to our ward's prejudice. "All doubts," say petitioners, "must be resolved in their [the Indians'] favor." Mr. Justice McLean, concurring in *Worcester* v.

[16] It is interesting to note that petitioners have already accepted the benefit of the opposite view. Prior to survey of the eastern boundary of the reservation, both the Indians and the whites thought that boundary was "some miles" west of where it actually turned out to be, and whites moved upon an easterly strip actually within the treaty reservation. Sen. Ex. Doc. No. 108, 47th Cong., 1st sess. (1882), p. 2. The Senate Committee on Public Lands, in reporting out the bill subsequently enacted as the Act of July 28, 1882, c. 357, 22 Stat. 178, spoke of the Indians having disclaimed any right to these lands. Sen. Rept. 186, 47th Cong., 1st sess.) p. 30. Petitioners nevertheless sued in the Court of Claims on the basis of the boundary as fixed in the 1868 Treaty. 45 C. Cls. 441.

> *Georgia*, 6 Pet. 515 at 582, said, "The language used in treaties with the Indians should never be construed to their prejudice." But the context shows that the Justice meant no more than that the language should be construed in accordance with the tenor of the treaty. That, we think, is the rule which this Court has applied consistently to Indian treaties. We attempt to determine what the parties meant by the treaty. We stop short of varying its terms to meet alleged injustices. Such generosity, if any may be called for in the relations between the United States and the Indians, is for the Congress.

See also *Choctaw Nation* v. *United States*, 318 U. S. 423, 432; *Creek Nation* v. *United States*, 318 U. S. 629, 634, 640; *United States* v. *Mille Lac Chippewas*, 229 U. S. 498, 500; *United States* v. *Choctaw and Chickasaw Nations*, 179 U. S. 494, 500.

Thus, this Court has made clear that it is not the rule that in dealing with Indian treaties and statutes the courts are to ignore the clear terms thereof and apply the agreements as the Indians understood them. As this Court said in *Choctaw Nation* v. *United States*, 318 U. S. 423, 432: "But even Indian treaties cannot be rewritten or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted

understanding of the parties." Acceptance of petitioners' contention here would require expansion of the 1880 agreement beyond its terms in the face of a legislative history which negatives any such intention by Congress. Ordinarily the making of a gift by Congress can be established only by plain language indicating such intention. *District of Columbia* v. *Johnson,* 165 U. S. 330, 338. But here petitioners seek to secure a gratuity by now asserting that some sixty years ago their ancestors were being so favored. Certainly, the rule of liberal construction of Indian treaties and statutes does not mean that the courts need only ascertain the unilateral understanding of the Indians. It would indeed be generous of the courts to accept without question whatever petitioners presently assert, without proof, was the understanding of their ancestors sixty years ago. "Such generosity, if any may be called for in the relations between the United States and the Indians, is for the Congress." *Shoshone Indians* v. *United States,* 324 U. S. 335, 353.

III

PETITIONERS' CLAIM IS BARRED BY RES JUDICATA

Since the Court of Claims held against petitioners upon the merits, it found it unnecessary to pass upon other defenses presented by the

United States (R. 28). The Government submits that the judgment of the court below should be affirmed for the additional reason that the judgment entered by the Court of Claims in 1910 is *res judicata* of the present claim (R. 24; *Ute Indians* v. *United States*, 45 C. Cls. 440).

The Act of March 3, 1909, c. 263, 35 Stat. 781, 788–789, conferred power on the Court of Claims to hear, determine and render judgment on the claims and rights of petitioners under the agreement of 1880 "including the value of all lands ceded by the said Indians which have been set apart and reserved from the public lands as public reservations or for other public uses". Suit was brought pursuant to that Act to recover "for the failure of the United States to dispose of the lands ceded by the agreement of 1880, for an accounting for the lands sold, and to recover compensation for the lands reserved by the United States for public purposes" (Fdg. 17, R. 23–24). After the deduction of allowable offsets judgments totalling $3,516,231.05 was entered for petitioners. *Ute Indians* v. *United States*, 45 C. Cls. 440; 46 C. Cls. 225.

If there is any validity to petitioners' claim that their right to payment for these lands arose from the 1880 act, then the claim falls squarely within the provisions of the 1909 Act and should have been presented and adjudicated in the earlier case. The Jurisdictional Act of 1938

as amended in 1941 under which the present case was brought expressly waives the defenses of lapse of time or limitations (R. 6), but does not waive the defense of *res judicata*. While the Act confers jurisdiction to determine "legal and equitable" claims, a claim previously adjudicated is not open for redetermination under such a jurisdictional act. *Duwamish et al. Indians* v. *United States*, 79 C. Cls. 530, 592; cf. *Klamath Indians* v. *United States*, 296 U. S. 244, 250. The 1910 judgment is, therefore, *res judicata* of the present case.

It is true that in the litigation resulting in the 1910 judgment none of the lands for which petitioners were compensated lay north of the true boundary described in the treaty (R. 24). But the failure of petitioners then to assert the present claim will not permit them to escape the bar of *res judicata*. It is well settled that if a second action is upon the same claim as that upon which judgment was previously rendered, the judgment is an absolute bar, not only of what was decided, "but also as to every ground of recovery which might have been presented." *Baltimore S. S. Co.* v. *Phillips*, 274 U. S. 316, 319; *Bates* v. *Bodie*, 245 U. S. 520, 526; cf. *United States* v. *California & Ore. Land Co.*, 192 U. S. 355. This view is supported by the legislative history of the 1909 Act which shows that the intention was to determine finally

the amount of money due the Indians under the 1880 agreement. 43 Cong. Rec. p. 2776.[17]

Petitioners cannot avoid the effect of the 1910 judgment on the ground that here reliance is placed on the Executive Orders of 1875 and 1882 and the prayer is for the value of land as for a taking rather than for an accounting. "A cause of action does not consist of facts, but of the unlawful violation of a right which the facts show." *Baltimore S. S. Co.* v. *Phillips,* 274 U. S. 316, 321. If the 1880 Act is eliminated from petitioners' case, there is no cause of action. Under the 1880 act all lands not reserved by allotment were released and conveyed to the United States and provision was made for the payment to petitioners. Hence, if petitioners' argument that the words "present reservation" in the 1880 act is accepted, it follows that under that act the executive-order lands were conveyed to the United States in 1880. Accordingly, those lands were covered by the claim asserted in the earlier litigation and the

[17] The portion of the Indian Appropriation Act of March 3, 1909, which gave the Court of Claims jurisdiction to hear, determine, and render judgment in this matter was added in the Senate Committee on Indian Affairs as an amendment to the bill passed by the House. Sen. Rep. No. 1036, 60th Cong. 2d sess. (1909), p. 2; 43 Cong. Rec. pt. 3, pp. 2769–2770, 2775–2776. The conference report recommended agreement to the amendment as amended in conference, and the conference report was agreed to. 43 Cong. Rec. pt. 4, pp. 3064–3065, 3320–3323.

judgment rendered in 1910 is *res judicata* of the claim here presented for the identical lands.[18]

CONCLUSION

It is respectfully submitted that, for the reasons stated, the judgment of the Court of Claims should be affirmed.

GEORGE T. WASHINGTON,
Acting Solicitor General.
DAVID L. BAZELON,
Assistant Attorney General.
MARVIN J. SONOSKY,
ROGER P. MARQUIS,
FRED W. SMITH,
Attorneys.

DECEMBER 1946.

[18] It is noteworthy that in the legislative history of the Special Jurisdictional Act of June 28, 1938, c. 776, 52 Stat. 1209, no mention is made of the executive-order claim. (H. Rep. No. 1028, 75th Cong. 1st sess.; S. Rep. No. 1219, 75th Cong. 1st sess.)

APPENDIX

Sections 1 and 6 of the jurisdictional Act of June 28, 1938, 52 Stat. 1209, 1210, read as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That jurisdiction is hereby conferred on the United States Court of Claims to hear, determine, and render final judgment on all legal and equitable claims of whatsoever nature which the Ute Indians or any tribe or band or any constitutent [1] band thereof, may have against the United States, including, but without limiting the generality of the foregoing, claims arising under or growing out of any treaty or agreement of the United States, law of Congress, Executive order, or by reason of any lands taken from them, without compensation, or for the failure or refusal of the United States to protect the interest of any of said bands in lands (as to which any of said bands had the possessory right of use and occupancy), or because of any mismanagement or wrongful handling of any of the funds, land, property, or business enterprises belonging to or held in trust for any of said bands by the United States, or any misfeasance or nonfeasance on the part of the United States with respect thereto, or otherwise.

* * * * *

[1] So in original.

SEC. 6. If the court shall find that any lands formerly belonging to the said bands of Ute Indians or any of them, have been taken by the United States without compensation therefor and set apart and reserved as national reservations or for other public uses or otherwise classified, reserved, or withdrawn from entry and sale under the public land laws or disposed of in any manner whereby the said Indians have been deprived of the use or benefits of such lands and the natural resources thereof, it is hereby declared that such action shall be sufficient grounds for equitable relief and the court shall render judgment in favor of said Indians, and shall award to them, as for a taking under the power of eminent domain, compensation for all such lands and natural resources, anything in any other Acts of Congress to the contrary notwithstanding, no lands in Colorado north of and including range 35 formerly owned or claimed by the Ute Indians or any band thereof shall be restored to tribal ownership under the provisions of section 3 of the Act of June 18, 1934 (48 Stat. 984), and said lands to the extent that they have not been disposed of by the United States are hereby declared to be the absolute property of the United States: *Provided*, That there is hereby added to the existing Southern Ute Indian Reservation in tribal ownership of the vacant, undisposed of ceded lands within the following described boundaries:

* * * * *

The Act of July 15, 1941, 55 Stat. 593, amending the above quoted jurisdictional act, reads as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That section 6 of the Act entitled "An Act conferring jurisdiction upon the United States Court of Claims to hear, examine, adjudicate, and render judgment on any and all claims which the Ute Indians or any tribe or band thereof may have against the United States, and for other purposes", approved June 28, 1938, is hereby amended by striking out the words "anything in any other Acts of Congress to the contrary notwithstanding" and inserting in lieu thereof a period and the following: "Anything in any other Acts of Congress to the contrary notwithstanding"; by striking out "range 35" wherever it appears in such section and inserting in lieu thereof the following: "township 35 north"; by striking out the word "of" following the word "ownership" appearing in the first proviso of the said section; and by striking out the word "constitutent" in section 1 and inserting in lieu the word "constituent".

Articles II and III of the Treaty of March 2, 1868, 15 Stat. 619, 2 Kappler 990, read as follows:

> ARTICLE 2. The United States agree that the following district of country, to wit: Commencing at that point on the southern boundary-line of the Territory of Colorado where the meridian of longitude 107° west from Greenwich crosses the same; running thence north with said meridian to a point fifteen miles due north of where said meridian intersects the fortieth parallel of north

latitude; thence due west to the western boundary-line of said Territory; thence south with said western boundary-line of said Territory to the southern boundary-line of said Territory; thence east with said southern boundary-line to the place of beginning, shall be, and the same is hereby, set apart for the absolute and undisturbed use and occupation of the Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit among them; and the United States now solemnly agree that no persons, except those herein authorized so to do, and except such officers, agents, and employes of the Government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law shall ever be permitted to pass over, settle upon, or reside in the Territory described in this article, except as herein otherwise provided.

ARTICLE 3. It is further agreed by the Indians, parties hereto, that henceforth they will and do hereby relinquish all claims and rights in and to any portion of the United States or Territories, except such as are embraced in the limits defined in the preceding article.

The Executive Order of November 22, 1875, 1 Kappler 834, reads as follows:

It is hereby ordered that the tract of country in the Territory of Colorado lying within the following-described boundaries, viz: Commencing at the northeast corner of the present Ute Indian Reservation, as defined in the treaty of March 2, 1868 (Stats. at Large, vol. 15, p. 619); thence

running north on the 107th degree of longitude to the first standard parallel north; thence west on said first standard parallel to the boundary line between Colorado and Utah; thence south with said boundary to the northwest corner of the Ute Indian Reservation; thence east with the north boundary of the said reservation to the place of beginning, be, and the same hereby is, withdrawn from sale and set apart for the use of the several tribes of Ute Indians, as an addition to the present reservation in said Territory.

Section 3 of the Act of March 6, 1880, 21 Stat. 199, 201, 203–204, 1 Kappler 180, 185, reads as follows:

SEC. 3. That the Secretary of the Interior be, and he is hereby, authorized to cause to be surveyed, under the direction of said commissioners, a sufficient quantity of land in the vicinities named in said agreement, to secure the settlement in severalty of said Indians as therein provided. And upon the completion of said survey and enumeration herein required, the said commissioners shall cause allotments of lands to be made to each and all of the said Indians, in quantity and character as set forth in the agreement above mentioned, and whenever the report and proceedings of said commissioners, as required by this act, are approved by the President of the United States, he shall cause patents to issue to each and every allottee for the lands so allotted, with the same conditions, restrictions, and limitations mentioned therein as are provided in said agreement; and all the lands not so allotted, the title to which is, by the said

agreement of the confederated bands of the Ute Indians, and this acceptance by the United States, released and conveyed to the United States, shall be held and deemed to be public lands of the United States and subject to disposal under the laws providing for the disposal of the public lands, at the same price and on the same terms as other lands of like character, except as provided in this act: *Provided*, That none of said lands, whether mineral or otherwise, shall be liable to entry and settlement under the provisions of the homestead law; but shall be subject to cash entry only in accordance with existing law; and when sold, the proceeds of said sale shall be first sacredly applied to reimbursing the United States for all sums paid out or set apart under this act by the Government for the benefit of said Indians, and then to be applied in payment for the lands at one dollar and twenty-five cents per acre which may be ceded to them by the United States outside of their reservation, in pursuance of this agreement. And the remainder, if any, shall be deposited in the Treasury as now provided by law for the benefit of the said Indians, in the proportion hereinbefore stated, and the interest thereon shall be distributed annually to them in the same manner as the funds provided for in this act: *Provided further*, That the subdivisions upon which are located improvements to be appraised, as provided for in section two of this act, shall be offered to the highest bidder at public sale, after published notice of at least thirty days by the Secretary of the Interior, and the same shall be absolutely reserved from occupation or claim until so sold.

The Executive Order of August 4, 1882, 1 Kappler 834–835, reads as follows:

> It is hereby ordered that the following-described tract of country in Colorado, viz: Commencing at the northeast corner of the present Ute Indian Reservation, as defined in the treaty of March 2, 1868 (Stats. at Large, vol. 15, p. 619); thence running north on the 107th degree of longitude to the first standard parallel north; thence west on said first standard parallel to the boundary line between Colorado and Utah; thence south with said boundary to the northwest corner of the Ute Indian Reservation; thence east with the north boundary of the said reservation to the place of beginning, withdrawn from sale and set apart for the use of the several tribes of the Ute Indians by Executive order dated November 22, 1875, be, and the same hereby is, restored to the public domain.

DEPARTMENT OF
THE INTERIOR
GENERAL LAND OFFICE
Washington, D. C. Aug 22, 1873

Special Instructions

ROBERT C. DARLING
U. S. Surveyor & Fort Supply, Idian Territory.

Survey of Eastern Bdy of Ute Indn. Reservation

Having entered into contract on this day for the survey of the Eastern boundary of the Tabequache, Muache, Capote, Weeminuche, Yampa, Grand River and Uinta Bands of Ute Indians, as described in the Second Article of the treaty concluded March 2, 1868,

Copy sent to First Comptroller U. S. Treasury Aug 27.

you will be governed by the terms of said contract and these instructions in the execution of the service contracted for.

The boundary to be surveyed and marked, begins on the 37th parallel of North latitude where the 107th Meridian of West longitude intersects the same and runs due North with said Meridian to a point fifteen miles North of where said Meridian intersects the 40th Parallel of North latitude.

The geographical points just mentioned being susceptible of approximate ascertainment from data of record in this office, it will not be absolutely necessary on your part to determine them by actual astronomical observations, but in order to carry out your contract, you will consider the corner established by Ehud N. Darling, Astronomer and Surveyor, at the intersection of the right bank of the Navajoe river with the 37th parallel of North latitude situated between the 223d & 24th miles of the North boundary of the Territory of New Mexico, as per diagram herewith marked "A".

You will consider said corner or the point of the intersection as aforesaid at the initial point of the Eastern boundary of the Ute Indian Reservation which you will commemorate by a conspicuous and enduring monument,

describing it fully in your field notes of survey, so that it may be readily identified by the Indians and other parties interested in the matter.

You will inscribe on the post denoting the Initial point on its Eastern face "37° N. L." on the Southern "N. M.", for New Mexico, on the Western face of the post "S. E. cor. Ute Res" for the South East corner of the Ute Reservation, and on the North face of the post, "E. By. U. R." for the East Boundary of the Ute Reservation.

You will furthermore perpetuate the Initial point of the Reservation by digging two pits on its Southern and Eastern Boundaries at a distance of 10 feet from the base of the mound surrounding the corner; the pits to be two feet square and 18 inches deep, if practicable.

The monument thus erected will be witnessed by as many permanent objects with bearings and admeasured distances from the same, if within five chains therefrom.

After you shall have thus established and conditioned the Initial point of the Ute Reservation, you will next survey, run and mark the Eastern boundary thereof by blazing the line through timber land, planting mile monuments with such material as the country through which you pass will afford,

selecting durable and conspicuous sites for the same.

In case your line passes over abrupt and insurmountable features of the country, presenting obstacles to chaining and marking it, you will determine distances by triangulations, recording the method in your field notes of survey for future reference, as well as describing the size and locality of mile posts or stone monuments.

It is important that the boundary be marked in the field with palpable evidences thereof, and especially in Valleys and where it crosses roads, rivers and other thoroughfares, whether such points coincide with regular mile distances or not.

In thus prosecuting the survey you will mark the mile monuments by inscribing on their East faces 1873, on the West "U. R. for the Ute Reserves, on the North, "E. By. for the East Boundary and on the South face "107° N. L."

In order to keep yourself on the due north course from the Initial point to the terminal point of the Eastern Boundary of the aforesaid Ute Indian Reservation, coinciding with the 222d mile from the said Initial point, you will endeavor to check your due north course by the most approved method used for the purpose. The terminal

mile point you will perpetuate with monument similar to that required to be erected at the Initial point, marking it on its West face "N. By. U. R" for the North Boundary of the Ute Reserve, on the South "E. By. U. R." on the North "107° N. L.", and on the East 1873, and digging the pits of the prescribed size and distance from the base of the terminal or 222d mile corner on the west and south sides thereof.

You will make note of the principal topographical features of the country on both sides of the line, so that you may be enabled to designate their positions on the maps of the boundary which you are required to furnish this office in triplicate on the completion of your work, together with triplicate field notes of the survey.

You will provide yourself with appropriate instruments and chains of standard measure, and pay vigilant attention to the chaining of the line, comparing frequently your working with the Standard Chain, as upon the faithful and careful admeasurement of the boundary, its correctness depends.

It is expected that you will prosecute the work contracted for with due diligence, looking to its completion within the time specified in your contract.

The returns of your survey must be rendered in triplicate, and in proper manner as is required by the printed Manual of Surveying Instructions, copy of which is sent you herewith, together with your account of service; all of which if found by this office to have been correctly performed, will be adjusted and reported for payment to the First Comptroller of the U. S. Treasury, with the request that draft or drafts in your favor may be sent to such place as you will indicate in the face of the account.

WILLIS DRUMMOND
Commissioner

RECORDS OF THE GENERAL LAND OFFICE.
Record Copies of Letters sent to
Surveyors General, Volume 27.
THE NATIONAL ARCHIVES,
Washington, D. C.

We hereby certify that we have assisted Robert C. Darling, Surveyor in surveying the Eastern Boundary of the Ute Indian Reservation of Colorado, from the 37th Paralel of N. Latitude: North to a point 15 miles North of the 40th Paralel, coresponding to the 222 mile corner, and that said Boundary has been in all respects to the best of our knowledge and belief well and faithfully surveyed, and the boundary

monuments planted according to the instructions furnished by the Commissioner of the General land office.

(middle initial
BERNARD unintelligible) JONES
JNO. LLOYD
JOHN B. SEARCH
JOHN P. DARLING

Sworn to and subscribed before me this 21st day of December 1873.

ALBERT B. JONES
Notary Public

I R. C. Darling do solemnly swear that in pursuance of a contract with the Hon. Willis Drummond Commissioner of the Gen'l Land Office dated Washington, D. C. Aug. 22nd 1873 I have faithfully surveyed and established the East boundary of the Ute Indian Reservation in the Territory of Colorado and that the foregoing are the true field notes of said survey.

ROBERT C. DARLING
U. S. Surveyor

Sworn to and subscribed before me this 11th day of February, 1874.

(Notary's name unintelligible)
Notary Public

DEPARTMENT OF
THE INTERIOR.
GENERAL LAND OFFICE.
February 17th 1874

The foregoing field notes of the survery of the East Boundary of the Ute Indian Reservation in Colorado Territory, executed by R. C. Darling, U. S. Surveyor, under his contract with the Commissioner of the General Land Office, dated August 22nd 1873, having been examined and found correct are hereby approved.

WILLIS DRUMMOND
Commissioner

DEPARTMENT OF
THE INTERIOR
GENERAL LAND OFFICE
Washington, D. C. Oct. 2, 1874

JAMES W. MILLER Esq.
Leavenworth Kansas

Special Instruct Survey of Ute N. Bdy & Boundaries of Ute ceded lands
See to Mr. Miller June 16, 1875 ($15,000-additional)

SIR: The Hon. Secretary of the Interior having directed the survey of the Northern line of the Ute Reservation in Colorado, as fixed by Treaty of March 2, 1868 and also the boundary lines of the Territory ceded by the Utes, and having designated you as the

surveyor, you will be governed by the terms of the Contract entered into by you on the 26th inst. and also by these instructions in the execution of the work contracted. In running the north line of the original Reservation you will commence at the 222nd mile post of the East Boundary of said Reserve which is the northeast corner thereof and run due west one hundred and nine miles where you will establish the northwest corner of the Ute Reservation.

The boundary lines of the *ceded* Territory which you are to run are the South, West and North described as follows:—"Beginning at a point on the Eastern Boundary of said Reservation fifteen miles due North of the Southern boundary of the Territory of Colorado, and running thence west on a line parallel to the said southern boundary to a point on said line twenty miles due East of the Western boundary of Colorado Territory; thence North by a line parallel with the western boundary to a point ten miles north of the point where said line intersects the 38th Parallel N. L. thence East to the Eastern Boundary of the Reservation—"

In surveying the outboundaries of the ceded lands you will start from the S. E. corner of the Ute Reservation, which is 3 chs 13 lks West of the 223rd

mile of the North Boundary of New Mexico, thence proceed due north to the 15th mile post of the Ute E. Bdy. or should you identify this mile post you can start from it, and then run measure and mark the line due west 90 miles and 53 chains, thence north 64 miles, thence east to the eastern Bdy of the Reservation—

For a description of the corners mentioned see an extract from the field notes herewith together with a sketch of the east boundary of the Ute Indian Reservation—By the agreement of Sept. 13, 1873, at the convention of Utes, all of Uncompahgre Park is to be excluded from the ceded lands. If, therefore, in running the last mentioned north line of the ceded lands you find it necessary to offset to the south to exclude said Park, you will do so sufficiently to exclude all the Park, which having done you will regain and continue your line to the East Boundary of the Reservation.

Uncompahgre Park.

After you shall have identified the initial point of the north boundary of the Ute Indian Reservation, marked as the 222nd mile of the Eastern boundary of the same you will thence run and mark the North boundary due West blazing the line through timber land if any there be, and planting mile monuments of as durable material as the country will afford, inscribing

thereon appropriate numbers and other marks. In case the line passes over abrupt and insurmountable features of the country presenting obstacles to chaining in place and marking the boundary, you will determine distances by triangulations, recording the method thereof in your field notes of the survey, as well as describing the size and locality of the mile monuments.

It is important that the boundary should be marked in the field with conspicuous evidences of its survey and especially this requirement should be carried out in valleys and where the line crosses roads, trails, rivers and other thoroughfares, whether such points coincide with regular mile distances or not.

You will take bearings to the principal topographical features of the adjacent country on both sides of the line, so that, with approximate correctness, you can show their positions on the map with reference to the boundary.

The terminal mile point or the northwest corner of the north boundary you will perpetuate by a conspicuous monument set to the cardinal points of the compass and similar to that erected at the initial point:—You will mark on its east face "N. Bdy. Ute R" on its west face "Utah" on its north face "1874" and on its south face "W. B'dy. Ute

R."—You will fully describe the monument in your field notes—The foregoing requirements will apply equally to the survey of the boundaries of the ceded lands to the U. S. by the Utes, Sept. 13, 1873, with a slight modification.

The returns of your survey must be rendered in triplicate together with your account for the service which if found correct, the amount will be reported for payment to the First Comptroller of the U. S. Treasury with the request that draft in your favor may be sent you to such place as you may direct on the face of the account—

I have to observe in this connection that your spheres of operations under the Contract being separated at great distances and in remote fields from settlements, you will be allowed, should exigency occur, to swear your assistants to faithfully perform their respective duties before engaging them, and also to administer the final oath to them after the execution of the work, but your own affidavit to the field notes of surveys under your contract, will be made before an officer authorized to administer oaths and having an official seal to attest his act—

By direction of the Secretary of the Interior the amounts set apart for these surveys, viz. $5,000 for the original North Boundary and $10,000 for

the ceded lands must not be exceeded in the least. Said amounts to be paid out of the appropriation of $292,680, per Act Approved June 23, 1874—The instructions to you of this date, in reference to the survey of the Wind River Shoshone Eastern Band of Indians of Wyoming, will be regarded by you as applicable in the survey contemplated in these instructions, so far as they relate to your making returns of survey & employing additional compassmen—For your use in the field I send you herewith 100 blank field books and 6 copies of the Manual of Surveying Instructions.

Field note paper and blank Tp. plats will be furnished to you upon application—

You are requested to acknowledge the receipt of these instructions.

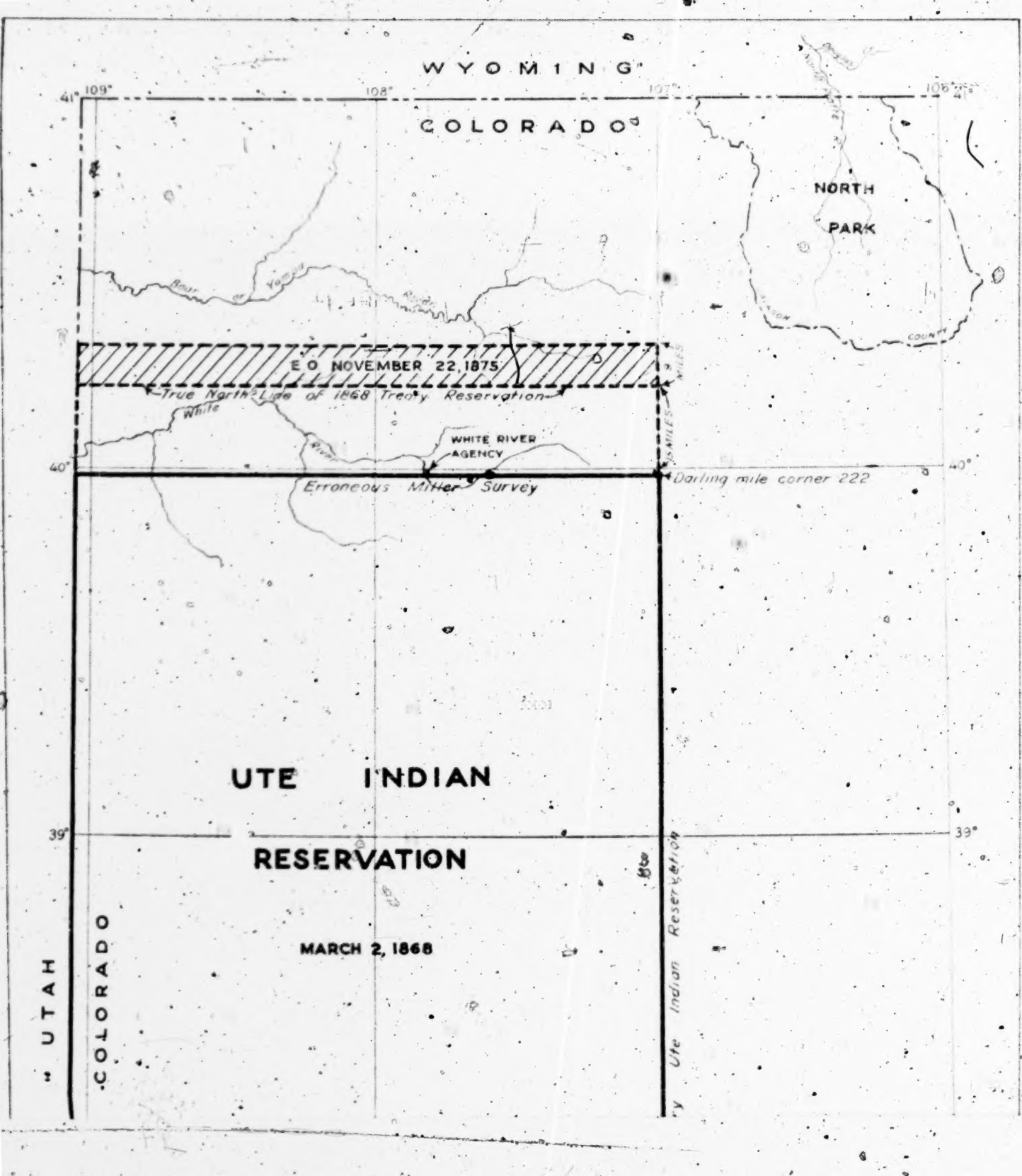
Very respectfully—

S. S. BURDETT

Commissioner

The NATIONAL ARCHIVES, Washington, D. C.
RECORDS OF THE GENERAL LAND OFFICE.
Record Copies of Letters Sent to
Surveyors General, Colorado.

U. S. GOVERNMENT PRINTING OFFICE: 1948


WYOMING
COLORADO
109°
108°
107°
106°
41°
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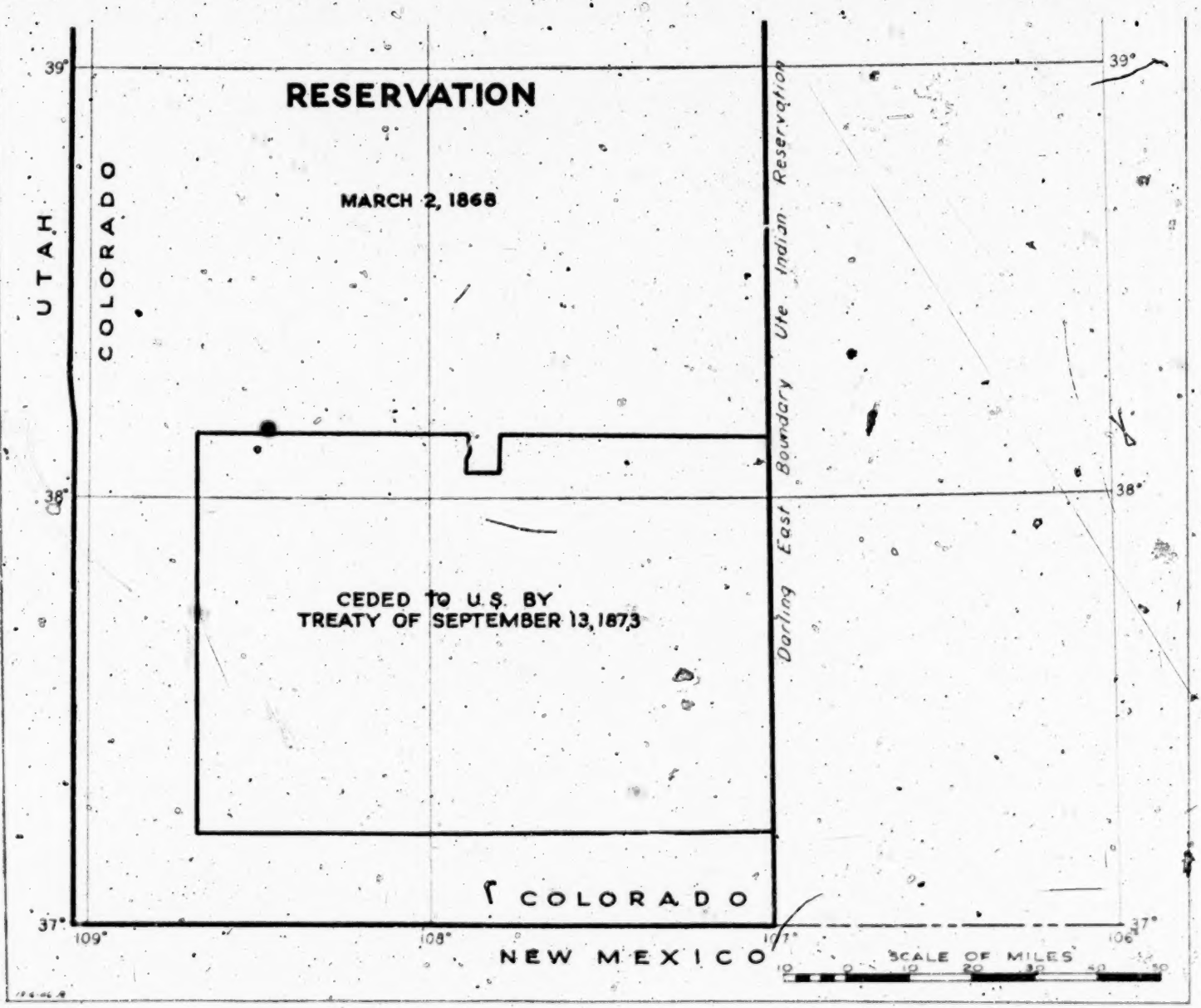
39°
NORTH
PARK
Route of Yampa
Yampa River
E O NOVEMBER 22, 1875
True North Line of 1868 Treaty Reservation
White
River
WHITE RIVER
AGENCY
Erroneous Miller Survey
Darling mile corner 222
UTE INDIAN
RESERVATION
MARCH 2, 1868
UTAH
COLORADO
Ute Indian Reservation


RESERVATION
MARCH 2, 1868
CEDED TO U.S. BY
TREATY OF SEPTEMBER 13, 1873
UTAH
COLORADO
NEW MEXICO
COLORADO
Darling East Boundary Ute Indian Reservation
39°
38°
37°
109°
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107°
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SCALE OF MILES
10 0 10 20 30 40 50

pp. 4, 6, 7,

SUPREME COURT OF THE UNITED STATES

No. 141.—October Term, 1946.

The Confederated Bands of Ute Indians, Petitioners, v. The United States.	On Writ of Certiorari to the Court of Claims of the United States.

[February 17, 1947.]

Mr. Justice Black delivered the opinion of the Court.

Petitioners brought this action in the Court of Claims under the Act of June 28, 1938, 52 Stat. 1209, as amended, 55 Stat. 593, to recover compensation for lands made available to them by an 1875 Executive Order of the President and subsequently taken from them by the United States. Their claim was that by an Act of 1880, Congress had undertaken to sell these lands for the benefit of the petitioners, but that they had never been compensated for them. The Court of Claims, one judge concurring specially, made findings of fact and concluded as a matter of law that petitioners had no compensable interest in the lands because they "never did acquire title to these . . . lands and . . . the Congress never did agree to sell them for the account of" petitioners. — Ct. Cls. —. We granted certiorari, — U. S. —.

The findings of the Court of Claims from official letters, Executive Orders and statutes incorporated in these findings were as follows:

A treaty of 1868, 15 Stat. 619, between the United States and petitioners' ancestors, the Ute Indian tribes, established a reservation for them in Colorado. The northern boundary of the 15 million acres there ceded was described in the treaty as a line fifteen miles north of, and parallel to, the 40th parallel of north latitude. In the 15-mile wide strip north of the 40th parallel lay the White River Valley which had been settled by the Utes as a most suit-

able place for grazing and cultivation. One of the two Government Indian agencies provided for the reservation by the treaty was established in that strip.

As a result of misunderstandings in 1869 and 1874 between the Utes and white settlers to the north as to the true location of the northern treaty boundary, a survey was made in 1875 by one Miller. Miller's instructions, however, required him to stake out a line which he admitted to the local Indian agent and to the Utes themselves to be fifteen to eighteen miles south of the true boundary described in the treaty. If Miller's line had been correct, it would have excluded from the 1868 reservation the fertile White River Valley, and would have also excluded the agency buildings which had been erected there.

The marking out of the erroneous Miller line greatly upset the Indians because they feared they would be driven from the White River Valley. This embarrassed the local Indian agent who had previously assured the Indians that the White River Valley lay within their reservation. He promptly reported the results of the survey and the reaction of the Indians to the Commissioner of Indian Affairs in Washington, and urged the necessity of a new survey at the earliest practicable date. He stated that if the Miller survey were correct, however, the Indians would be driven from the White River Valley—"the only farming land and stock range in this part of the reservation"—and forced to settle on a river forty miles to the south. The Commissioner, acting on this report and a statement by Miller's attorney that Miller's line was correct, wrote to the Secretary of the Interior that the Miller survey "develops the fact that the White River and surrounding valleys as well as the Agency buildings and improvements at the White River Agency lie north of the . . . boundary and consequently are not within the limits of the . . . Ute Reservation." He therefore recom-

mended to the Secretary that the President be requested to issue an Executive Order to make available to the Utes additional territory north of the 1868 treaty boundary. The President, on the recommendation of the Secretary of the Interior, issued the order.[1] And thereafter the Commissioner wrote the local agent that the order included "all that tract of country lying between the north boundary of the Ute reservation as defined in the treaty of March 2, 1868 . . . which was the boundary surveyed by Mr. Miller. . . . This action fully protects your Indians in the peaceable possession of their improvements in the White River Valley and the Agency buildings, and will enable you to assure the Indians of the exact location of their reservation as enlarged."

In 1879, several years after the Executive Order was issued, hostilities broke out between some of the Utes and Government representatives in which the Indian agent at White River, all the agency's male employees, and a U. S. military detachment were killed in the so-called "Meeker massacre." Ex. Doc. No. 1, pt. 5, 47th Cong., 2d Sess. (1879) 16–19, 82–97. There have been charges and counter-charges as to who was responsible for inciting these hostilities. Whoever was responsible, it is clear that Congress, aroused by the massacre, took steps to punish the

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[1] The Executive Order of November 22, 1875, 1 Kappler, Indian Affairs, Laws and Treaties, 834 (1904) is as follows:

"It is hereby ordered that the tract of country in the Territory of Colorado lying within the following-described boundaries, viz: Commencing at the northeast corner of the present Ute Indian Reservation, as defined in the treaty of March 2, 1868 (State. at Large, vol. 15, p. 619); thence running north on the 107th degree of longitude to the first standard parallel north; thence west on said first standard parallel to the boundary line between Colorado and Utah; thence south with said boundary to the northwest corner of the Ute Indian Reservation; thence east with the north boundary of the said reservation to the place of beginning, be, and the same hereby is, withdrawn from sale and set apart for the use of the several tribes of Ute Indians, as an addition to the present reservation in said Territory."

Indians who participated in it, to dispossess the Utes of their reservation, and to remove them from Colorado. Congressional action to accomplish this was provided by the Act of June 15, 1880, 21 Stat. 199, which ratified and embodied an agreement reached earlier that year between the Government and the leaders of the Utes who had promised "to use their best endeavors with their people to procure their consent to cede to the United States all the territory of the present Ute Reservation. . . ." This Act authorized specific allotments to individual Indians from the lands so ceded. But § 3 provided that "all the lands not . . . allotted, the title to which is, by the said agreement of . . . the Ute Indians, and this acceptance by the United States, released and conveyed to the United States . . ." would be restored to the public domain for sale as public lands. The proceeds of the sale of the land so conveyed by the Utes to the United States were, upon satisfaction of indemnity conditions imposed because of the massacre, to be distributed to the Indians. Thereafter, in 1882, an Executive Order declared that the lands withdrawn from the public domain by the Executive Order of 1875 and "set apart for the use of the . . . Ute Indians . . . hereby is restored to the public domain." 1 Kappler, *supra*, 834–835.

§ Pursuant to an act of 1909, 35 Stat. 781, petitioners recovered a judgment for the proceeds of certain lands sold by the Government, as well as the value of certain lands appropriated by the Government to its own use, all of which were part of the 1868 treaty lands. The Ute Indians *v.* United States, 45 Ct. Cls. 440, 46 Ct. Cls. 225. Thus, except for certain treaty lands not at issue here, litigation concerning which is now pending in the Court of Claims, the only lands in Colorado for which the Indians have not been paid are those to the north of and outside the 1868 treaty reservation which were made available to them by the Executive Order of 1875. ~~1868 treaty reservation which were made available to them by the Executive Order of 1875.~~

In pursuit of compensation for these Executive Order

lands, petitioners have brought this action pursuant to the Act of June 28, 1938, *supra*. That Act confers jurisdiction on the Court of Claims to hear, determine, and render final judgment on all legal and equitable claims of the Utes and to award judgment for the Indians where it is found "that any lands formerly belonging" to them "have been taken by the United States without compensation. . . ."

Petitioners contend here that their predecessors understood that they not only owned the White River Valley lands, but that they also owned the Executive Order lands when, in 1880, they agreed to cede their reservation; and that Congress, by incorporating the agreement in the 1880 Act, thereby ratified it along with the Indians' understanding of it. Petitioners further contend that whether or not Congress intended to obligate the Government to account for the Executive Order lands, they knew of the Indians' understanding so that "the understanding of the Indians having been established," their understanding entitles them to recover. Finally they argue that the Executive Order, unlike the one in issue in *Sioux Tribe of Indians v. United States*, 316 U. S. 317, conveyed a compensable interest to these Indians. The Government counters that the President had no power to give a compensable interest to the Indians to lands lying outside the true 1868 treaty boundaries; that if the President intended to make available lands outside the true boundary it was only to give a transitory, possessory, and not a compensable, interest; that his intent was, in fact, only to secure the Indians in their possession of the White River Valley, but no more, on the mistaken assumption that the White River Valley had been cut off from the reservation by the Miller survey; that the 1880 Act, neither by its terms, its legislative history, nor its administrative interpretation, suggests that Congress intended to ratify or expand the Executive Order or to compensate the Indians for the Executive Order lands; that the Indians did not have a

contrary understanding; that in the face of such clear legislative language and intent, a contrary understanding of the Indians, even if established, could not justify a holding that the Indians obtained a compensable interest.

~~It is conceded that the petitioners have already been fully compensated for the White River valley lands and, in fact, for every acre of the land which was contained in the true boundaries of the 1868 reservation.~~ The additional claim, insofar as it rests on the Executive Order of 1875, cannot be sustained. For the President had no authority to convey to the petitioners a compensable interest in the lands described in the order lying north of the true 1868 boundary. *Sioux Tribe of Indians* v. *United States, supra.*[2] Nor is there any indication in the findings that the President intended to convey more than a transitory, possessory interest by the 1875 Order. That order made the Indians no more than tenants at the will of the Government on that part of the land outside the true treaty reservation. *Id.* at 331. Moreover, the Court of Claims' findings of fact, as emphasized by the special concurring opinion, indicate that the Executive Order was promulgated under the mistaken belief that its issuance was necessary in order to give the Indians the use of the White River Valley lands intended to be granted to them by the 1868 treaty and from which they might otherwise have been excluded by the Miller survey. These findings do not indicate that the Commissioner, the Secretary, or the President intended the order to make available the lands it in fact described lying north of the true treaty boundary. The order was designed only to resolve the misunderstanding created by Miller about the White River Valley lands.[3]

[2] *Cf.* Executive Order of August 17, 1876, which interpreted a treaty so as to "set apart (certain land) as a part of the Ute Reservation, in accordance with the first article of an agreement made with said Indians and ratified by Congress. . . ." 1 Kappler, *supra*, 834.

[3] The Court of Claims did not find this as an ultimate fact. But the correspondence which plainly shows it was incorporated in the find-

~~It is conceded that the petitioners have~~ either been, or are currently pressing litigation in the Court of Claims by which they seek to be compensated for the White River Valley lands, and in fact for all of the land which

The fullest possible purpose of the Executive Order has actually been carried out. For the Indians' enjoyment of the White River lands was protected during their stay on the reservation, and the Government has paid the Indians for them. It is with these things in mind that we must consider petitioner's contention that they have a right to recover compensation because of the 1880 Act.

There is not one word in that Act showing a congressional purpose to convey the Executive Order lands, or any other lands, to the Indians. On the contrary, the Act embodied a transaction whereby the Indians were the transferors and conveyed lands to the Government. For the value of lands so conveyed, and for no other, the Government was to make an account to the Indians after certain deductions had been made.

Nor is it possible to deduce from the 1880 Act a congressional purpose to transform the Executive Order into a conveyance of something more than a mere temporary and cancellable possessory right to the Indians. Neither the language of the 1880 Act, its legislative history, nor the circumstances which brought it about, justify the claim that Congress intended to expand the Executive Order into a transfer of a compensable interest in lands not included in the original treaty reservation. The Act was an aftermath of the "Meeker massacre." With the massacre in mind, Congress decided to remove the Indians from the Colorado reservation as part of the punishment meted out for this tragedy.[4] The very first section of the

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ings. This Court has said with reference to findings of the Court of Claims that the "absence of the finding of an ultimate fact does not require a reversal of the judgment if the circumstantial facts as found are such that the ultimate fact follows from them as a necessary inference." *United States* v. *Wells*, 283 U. S. 102, 120.

[4] See S. 772 and S. Res. 51, 10 Cong. Rec. pt. 1 (1879) 30, 77; H. Res. 142, 10 Cong. Rec. 44; H. R. 2420, 10 Cong. Rec. 17; H. Res. 154, 10 Cong. Rec. 113; H. R. 5092, 10 Cong. Rec. pt. 2 (1880) 1538.

For the Indians' enjoyment of the White River lands was protected during their stay on the reservation, and the lands have either already been paid for, or are the subject of pending litigation in the Court of Claims whereby the Indians

1880 Act prohibited any payments at all to the Indians until the Indians involved had surrendered, been apprehended, or until the President had proof that they were dead or outside the United States. Compensation for the families of the massacre victims was to be deducted from the land sale proceeds payable to the Indians. We cannot find from this background a congressional purpose to make a gift to the Indians of the Executive Order lands for which compensation is here sought. The only lands for which Congress agreed in 1880 to compensate the Indians were those that "the title to which" the Indians then "released and conveyed to the United States." They could only release and convey the lands that belonged to them, and only the lands given to them by the original 1868 treaty belonged to them. It was for compensation for such lands only that Congress, in 1938, authorized this action to be maintained. Under all these circumstances, the fact that the 1880 Act required the chiefs and headmen to procure the consent of their people to the cession of "the present Ute Reservation," is not sufficient to attribute to Congress a purpose to treat as a part of that reservation, lands which had never been legally conveyed to the Indians and which had only been made available to them by the Executive Order for the sole purpose of making them secure in their possession of the White River Valley.

It is said, however, that the Indians understood in 1880 that they owned the Executive Order lands which lay north of the White River Valley; that they understood their "present Ute reservation" to include them; that they understood that Congress undertook by the 1880 Act to sell the lands for their benefit; and that Congress was aware of this understanding. The majority opinion of the Court of Claims stated that "in all probability" this was true. The writer of the concurring opinion thought differently. But even if the Indians had believed that they had a compensable interest in the Executive Order lands,

this fact would not necessarily have given it to them. Certainly the absence of presidential authority to give them a compensable title could not be supplied by the Indians' understanding that the President had such authority. The Sioux Indians may also have thought the President had authority to convey title to them; but the reasons on which our decision in the *Sioux* case, *supra*, rested do not indicate that our holding depended in any way upon the understanding of the Indians. Nor can this alleged understanding be imputed to Congress in the face of plain language and a rather full legislative history indicating that the 1880 Act neither conveyed nor ratified conveyance of these lands. While it has long been the rule that a treaty with Indians is to be construed so as to carry out the Government's obligations in accordance with the fair understanding of the Indians, we cannot, under the guise of interpretation, create Presidential authority where there was none, nor rewrite congressional acts so as to make them mean something they obviously were not intended to mean. *Choctaw Nation* v. *United States*, 318 U. S. 423, 431–432. We cannot, under any acceptable rule of interpretation, hold that the Indians owned the lands merely because they thought so. Solicitous as the Government is to carry out its promises to the Indians in good faith, we are satisfied from this record that the Government has performed all that it promised.

As we have pointed out, it seems obvious to us from the findings of the Court of Claims that the Executive Order was only intended to secure for these Indians' ancestors possession of the White River Valley lands conveyed to them by the original 1868 treaty, and which was jeopardized by the Miller survey.[8] In fact, the President had no authority to convey a compensable interest in these or other lands to the Utes. Fairly to carry out the 1868

[8] See p. 6, *supra*.

treaty was the order's aim. The 1880 Act, we believe, did not enlarge upon the limited purpose of the Executive Order. To compensate these Indians for lands not intended to be conveyed by the 1868 treaty the Executive Order, nor the 1880 Act, would be to pay them for lands which neither they nor their ancestors ever owned and to which they had no claim in equity or justice, so far as the transactions here at issue are concerned. No rule of construction justifies such a result.

Affirmed.

SUPREME COURT OF THE UNITED STATES

No. 141.—October Term, 1946.

The Confederated Bands of Ute Indians, Petitioners, v. The United States. | On Writ of Certiorari to the Court of Claims of the United States.

[February 17, 1947.]

Mr. Justice Murphy, dissenting.

The United States, in my opinion, is morally and legally obligated to pay for the land in issue in this case. The Executive Order of 1875 by its terms set aside certain land up to the "first standard parallel north" for the use of the Ute Indians "as an addition to their present reservation." That order alone, of course, could convey no compensable interest to the Indians under the rule of *Sioux Tribe* v. *United States*, 316 U. S. 317. But events subsequent to the issuance of the Executive Order in this case make inapplicable the principle of the *Sioux* case. In 1880 the United States and the Ute chiefs and headmen entered into an agreement whereby the latter promised "to use their best endeavors with their people to procure their consent to cede to the United States all of the territory of the present Ute Reservation in Colorado." Congress thereupon passed the Act of June 15, 1880, which recited in its preamble that the chiefs and headmen had "submitted to the Secretary of the Interior an agreement for the sale to the United States of their present reservation in the State of Colorado." The Act then incorporated the agreement previously made and provided that all unallotted lands should be deemed to be released and conveyed to the United States.

It seems clear to me that by 1880 the term "present reservation" included the land which the Executive Order of 1875 stated had been set aside as an addition to the then

present reservation. And when the 1880 agreement and the 1880 Act referred to "present reservation" they must have included that additional land. Adding this informal acknowledgment by Congress of the expanded reservation to the occupation of the land by the Indians and their understanding that it belonged to the reservation, a compensable interest becomes evident. It is immaterial that there were no formal documents conveying a fee simple interest to the Indians; it is likewise irrelevant that there was no formal acknowledgment of the Indian title. *Spalding* v. *Chandler*, 160 U. S. 394; *United States* v. *Alcea Band of Tillamooks*, 329 U. S. —. It is enough that the Indians had the right to possess and occupy the land and that the Indians fairly understood that to be the case. An acknowledgment by Congress, however informal, then adds a legal obligation to the moral duty of the United States to pay for the land involved. Such is the situation here.

The Court indicates, however, that the Executive Order of 1875 does not mean what it says. It clearly set apart for the use of the Indians "as an addition to their present reservation" all the described land up to the "first standard parallel north." But it is now suggested that those responsible for the promulgation of that order did not really intend to set aside all the land up to the "first standard parallel north," despite the explicit language used. It is said, rather, that the order actually was designed to affect only the White River Valley lands—lands which are some nine miles south of the "first standard parallel north." That interpretation of the intent of the framers of the order would make the northern boundary of the Executive Order land coterminous with the northern boundary of the true treaty reservation.

But there is nothing in the findings of the Court of Claims to justify such an interpretation. To disregard the plain words of the order by subtracting a nine-mile

strip from a clearly worded description requires definite findings to that effect which are supported by the record. It is not our function, of course, to supply those findings ourselves. Nor can we infer them from the decision of the Court of Claims. That court alone has the power and the duty to make the necessary findings on material issues. 53 Stat. 752, 28 U. S. C. § 288; *United States* v. *Causby*, 328 U. S. 256, 267–268. If it is material that the framers of the Executive Order intended to set aside less land than that described in the order, the case should be remanded to the Court of Claims so that it can make the necessary findings in this respect.

MR. JUSTICE FRANKFURTER and MR. JUSTICE DOUGLAS join in this dissent.